

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

- - - - -

In the Matter of

1989 CABLE COPYRIGHT ROYALTY

DISTRIBUTION PROCEEDING

DOCKET NO.
CRT 91-2-89CD

- - - - -

(This volume contains pages 792 through 1010)

Washington, D.C.

Tuesday,
September 24, 1991

The above-entitled matter came on for
hearing, pursuant to adjournment, in the Offices of
the Copyright Royalty Tribunal, in Room 921, 1825
Connecticut Avenue, N.W., Washington, D.C., at 10:00
a.m.

BEFORE:

MARIO F. AGUERO	Chairman
J.C. ARGETSINGER	Commissioner
CINDY DAUB	Commissioner
ROBERT CASSLER	General Counsel

NEAL R. GROSS

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WASHINGTON, D.C. 20005

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APPEARANCES:**PROGRAM SUPPLIERS:****On behalf of MPAA:**

ARTHUR SCHEINER, ESQUIRE
DENNIS LANE, ESQUIRE
Holland & Knight
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202) 955-5550

MUSIC CLAIMANTS:**On behalf of ASCAP:**

I. FRED KOENIGSBERG, ESQUIRE
White & Case
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200

BERNARD KORMAN, ESQUIRE
BENNETT M. LINCOFF, ESQUIRE
ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 621-6270

On behalf of BMI:

CHARLES T. DUNCAN, ESQUIRE
MICHAEL FABER, ESQUIRE
JOSEPH J. DiMONA, ESQUIRE
Reid & Priest
Market Square
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-4081

EDWARD W. CHAPIN, ESQUIRE
General Counsel
Broadcast Music, Inc.

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WASHINGTON, D.C. 20005

APPEARANCES: (Continued)**On behalf of SESAC:**

LAURIE HUGHES, ESQUIRE
SESAC, Inc.
55 Music Square East
Nashville, Tennessee 37203
(615) 320-0055

On behalf of National Association of Broadcasters:

JOHN I. STEWART, JR., ESQUIRE
WILLIAM D. WALLACE, ESQUIRE
LORI V. BATTISTONI, ESQUIRE
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

On behalf of Joint Sports Claimants:

ROBERT A. GARRETT, ESQUIRE
TERRI SOUTHWICK, ESQUIRE
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

PHILIP R. HOCHBERG, ESQUIRE
Baraff, Koerner, Olender & Hochberg
5335 Wisconsin Avenue, N.W., Suite 300
Washington, D.C. 20015-2003
(202) 686-3200

On behalf of Public Television Claimants:

THOMAS P. OLSON, ESQUIRE
Randolph D. Moss, Esquire
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6651

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APPEARANCES: (Continued)**On behalf of Devotional Claimants:**

JOHN H. MIDLEN, JR., ESQUIRE
GREGORY H. GUILLOT, ESQUIRE
Midlen & Guillot, Chartered
3238 Prospect Street, N.W.
Washington, D.C. 20007-3214
(202) 333-1500

CLIFFORD HARRINGTON, ESQUIRE
BARRY H. GOTTFRIED, ESQUIRE
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(202) 659-3494

GEORGE R. GRANGE, II, ESQUIRE
RICHARD M. CAMPANELLI, ESQUIRE
Gammon & Grange
1925 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 862-2000

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C O N T E N T S

EXAMINATION

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Joint Sports Claimants

Paul Bortz

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E X H I B I T S

FOR

NUMBER IDENTIFICATION RECEIVED

Joint Sports Claimants

(None)

Program Suppliers

1-X (market comparison of Form 3)	920
2-X (Sports survey comparison)	921
3-X (Form 3 subscribers)	925
4-X (TV Stations Carried Form 3)	932

Public Television

(None)

NAB

(None)

Devotionals

(None)

Music

(None)

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P-R-O-C-E-E-D-I-N-G-S

10:02 a.m.

1
2
3 CHAIRMAN AGUERO: Good morning. This
4 morning we will continue with the 1989 Phase 1 Cable
5 Royalty Distribution with the Joint Sports Claimant.
6 But before, we would like to tell these people here,
7 my friends from MPAA, that we have a motion -- problem
8 yesterday. And we would like to hear from Mr. Arthur
9 Scheiner, do you have any comment on this because we
10 would like to have an answer, if it is possible, by
11 Friday?

12 MR. SCHEINER: I think that may be very
13 difficult, Mr. Chairman. I much prefer if you would
14 give us some additional time to complete our answer
15 to that motion.

16 CHAIRMAN AGUERO: How much?

17 MR. SCHEINER: How much time do you think?

18 CHAIRMAN AGUERO: Friday is what date,
19 the 20 -- 20 what?

20 MR. SCHEINER: The 27.

21 CHAIRMAN AGUERO: 27th. 28, 29. How many
22 more do you wish to have, Mr. Scheiner?

23 MR. SCHEINER: How about next Wednesday?

24 CHAIRMAN AGUERO: Commissioners? The 27th
25 It will be accepted.

1 MR. SCHEINER: Thank you, sir.

2 CHAIRMAN AGUERO: Thank you.

3 Do you have any comment before we begin
4 to proceed now?

5 MR. GARRETT: On the motion, none, Mr.
6 Chairman. I do have a brief --

7 CHAIRMAN AGUERO: Any --

8 MR. GARRETT: -- opening statement.

9 CHAIRMAN AGUERO: Any other comment?
10 Would you please?

11 MR. GARRETT: A brief opening statement.

12 CHAIRMAN AGUERO: Yes.

13 MR. GARRETT: Thank you.

14 CHAIRMAN AGUERO: Thank you very much.

15 MR. GARRETT: Mr. Chairman, Members of the
16 Tribunal, last week -- (interrupted by siren)

17 CHAIRMAN AGUERO: I like the police --

18 MR. GARRETT: Do you like that?

19 CHAIRMAN AGUERO: I love it, yes.

20 MR. GARRETT: Well, it's a lot better than
21 crouching over by the tables, Mr. Chairman.

22 Last week when Mr. Valenti was here to
23 testify, he drew upon the experiences of a rather
24 well-known American author, James Branch Cabot -- you
25 see how well known he is -- James Branch Cabel. That

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1 part I remember.

2 To illustrate some of the differences
3 between our approach and the MPAA's approach in this
4 case, I, too, would like to draw upon some of the
5 wisdom and teachings of another great American, and
6 that's Yogi Berra. Yogi Berra once said, actually in
7 a line that has frequently been quoted by President
8 Bush, that "you can observe a lot just by watching."
9 Now think about that for a few minutes.

10 I think all of us here in this room have
11 had the opportunity to observe the Tribunal's
12 proceedings for more than a decade now, and during
13 that period, we have not only observed a lot but I
14 think we've learned a lot as well. And most
15 importantly what we've learned is that these
16 proceedings here involve market place inquiries. They
17 are efforts by the Tribunal to ensure that each of the
18 claimant groups walks away from the hearings and the
19 distribution proceedings with essentially the same
20 share of the Royalty Fund that they would have come
21 away with had there been free market place
22 negotiations absent the compulsory license. And
23 Congress, when they adopted the Cable Compulsory
24 License in the 1976 Act, did so as an administrative
25 convenience. They did so to avoid the transaction

1 costs that all of the parties here would otherwise
2 incur but for compulsory licensing. What they didn't
3 intend to do when they adopted that scheme was to
4 deprive anyone of the relative share of royalties that
5 they would have otherwise received in a free market
6 place setting.

7 Your decisions over the years have
8 recognized the primary criteria of market place value,
9 harm and benefit, but these are all criteria that
10 ultimately go to the question of what share would each
11 claimant group receive in a free market place absent
12 the compulsory license.

13 We, as the Joint Sports Claimants,
14 strongly support that market place approach. We think
15 it's fair, we think it's reasonable, it's consistent
16 with Congressional intent. I don't believe that
17 there's anyone here in the room that ask that you
18 reconsider or reevaluate that market place type of an
19 inquiry.

20 The more difficult question that has
21 plagued the Tribunal over the years is what types of
22 evidence are going to best help the Tribunal arrive
23 at a decision which approximates those relative market
24 place shares for the claimants? And what we have in
25 this proceeding here are two principal studies that

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1 are offered to help the Tribunal make those types of
2 market place decisions.

3 On the one hand, you have a viewing study
4 that we've heard about over the past two weeks. It's
5 a study that is offered this year, as in past years,
6 solely by the Motion Picture Association. We will
7 also be presenting over the next couple of days an
8 alternative study, and that is a constant sum study
9 of cable operators and how they value programming.
10 That study is sponsored by the Joint Sports Claimants.
11 It's relied upon by the Commercial Television
12 Claimants and the Devotional Claimants. The Public
13 Television Claimants do not like the numbers that our
14 survey gives them but it is a fact that in the 1983
15 proceeding they, too, submitted to the Tribunal a
16 constant sum survey. And our friends the Canadians
17 are no longer parties to this proceeding but I think
18 it's instructive to note that before they exited they,
19 too, had submitted a constant sum study for the
20 Tribunal's consideration.

21 Now, there are very significant
22 differences between the viewing study on the one hand
23 and the constant sum study on the other hand. We, in
24 the constant sum study, focus on cable operators.
25 These are the people that we would be dealing with in

1 a free market place setting. They would be the people
2 sitting on the other side of the negotiation table and
3 in our judgment, they are the appropriate individuals
4 for the Tribunal to focus on in this proceeding. The
5 MPAA, on the other hand, has a viewing study that
6 focuses upon viewing habits of cable subscribers.
7 They are not the people who we would be negotiating
8 with in a free market place setting.

9 Joint Sports Claimants, in the constant
10 sum study, look at how cable operators value programs;
11 how they themselves would allocate royalty payments
12 or their program budgets. It really goes to the heart
13 of the issue that is here before the Tribunal.

14 The MPAA, in some of its testimony, I
15 think makes much of the fact that they rely upon data
16 that's already in existence and that we, on the other
17 hand, have done something unique and special for the
18 Tribunal. I don't see that as a fault, frankly. I
19 think that's a plus, that's an advantage. Our study
20 goes to the very issues that you have to deal with.
21 It asked the cable operators to perform the types of
22 judgments that Congress has entrusted you to perform.

23 The MPAA does, as it looks at the amount
24 of time that cable households spend viewing different
25 types of programming, it's a time-based study. They

1 have testified and made it quite clear that time is
2 a critical factor, it's not just a viewing study, it's
3 a time study. And the Tribunal has stated over the
4 years that time is a secondary consideration. It is
5 one that does not give a good or accurate picture of
6 what would go on in the market place?

7 And both of these studies are not only
8 different in their approaches but they are also quite
9 different in terms of the results that they produce.

10 Now, I guess I should note that when we're
11 speaking of movies, it probably doesn't make any
12 difference which study you look at, constant sum or
13 viewing. The numbers are pretty much the same. As
14 a matter of a fact, our survey gives movies a little
15 better showing than the MPAA viewing study.

16 The real difference comes in judging the
17 values of syndicated programming on the one hand and
18 live sports programs on the other hand. The MPAA
19 viewing study provides its biggest rewards for
20 programs, syndicated programs, that are already widely
21 available over local television, that have been shown
22 time and time again over the years, that are really
23 relatively cheaply and plentifully available in the
24 market place, and that have been compensated over and
25 over again by the Tribunal over the years.

1 The programs that rank up at the top of
2 the list, and the ones that receive the most amount
3 of royalties, are programs that this Tribunal has
4 repeatedly compensated since 1979. Little House on
5 the Prairie, Andy Griffith, The Flintstones, Tom &
6 Jerry. Those are the programs that MPAA study shows
7 have a greater value to cable operators than sports,
8 all the live sports, and distant signals. And I
9 submit that it's simply a non-sensible showing.

10 There's nothing in this record other than
11 MPAA's study to suggest that those top five or six
12 programs, cartoon shows, shows that were produced back
13 in the '60s, would be valued by cable operators more
14 than major league baseball, National Basketball
15 Association, college football and basketball, all the
16 other sports that comprise Joint Sports Claimant's
17 category.

18 Our survey produces a very different
19 result and that what it rewards primarily are live
20 sports programs. These are programs that are shown
21 once. They are fresh; they are unique. You do not
22 see them appearing over and over again. They appear
23 once and they are compensated only once by the
24 Tribunal. Whatever opportunity we have to make any
25 revenue on those telecasts comes at one time and one

1 time only, and each show is different and unique.

2 Now, we recognize, as we must here, that
3 we are not writing on a clean slate. The Tribunal had
4 viewing and constant sum studies before it in the 1983
5 proceeding. I think it's important to note that we
6 had settled with the Motion Picture Association at
7 the outset at that 1983 proceeding. And we did not
8 present any challenge to the Nielsen viewing studies
9 and, frankly, we didn't make much of an effort to
10 defend the constant sum studies that we had put into
11 the record in that particular year. And based upon
12 that record, the record that was before you, you made
13 certain awards to us and to MPAA, and the other
14 parties.

15 Frankly, these awards did not effect the
16 settlement agreements that we had with MPAA in '83 or
17 during the next couple of years, but it is a fact that
18 the precedent you established, 1983's precedent that
19 we must deal with here in the 1989 proceeding. And
20 there are a couple of conclusions that you reached
21 there that really serve as the focal point of our case
22 today.

23 Having seen my chicken scratchings on pads
24 over the past couple of weeks, the first thing that
25 you will notice about these charts is that I didn't

1 do them. They do, however, provide, from our
2 perspective, a focal point for the issues that we are
3 confronting in our direct case and what we are trying
4 to address in our direct case.

5 Most importantly, the Tribunal found in
6 it's '83 Final Determination, that the Nielsen study
7 has features to it that are superior to an attitudinal
8 survey, which includes the constant sum survey. And
9 that has lead it, the Tribunal, to give it far greater
10 weight than any other piece of evidence in the record.
11 And that particular finding, I think, has particular
12 significance and impact upon the Joint Sports
13 Claimants as reflected in the next quotation, which
14 is that, the Nielsen study, or the MPAA viewing study
15 provides the ballast which keeps the sports award down
16 below levels we might otherwise achieve.

17 I think it's important to emphasize, as
18 I did earlier, that these conclusions were based upon
19 the record before you in the 1983 proceeding and we're
20 not challenging those conclusions on the basis of that
21 record. What we are trying to do in this proceeding,
22 and what we think will do, is to provide you with a
23 new record, a record that specifically addresses some
24 of the concerns that you raised in the 1983 proceeding
25 and a record that also raises various other issues

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1 with respect to the MPAA viewing study.

2 I think you will find as we go through our
3 case that there are really three principal things.
4 The first is that the constant sum study deserves much
5 greater weight that was accorded it on the basis of
6 the 1983 record. And the second is that the MPAA
7 viewing study deserves significantly less weight that
8 was accorded it in the 1983 proceeding. And finally,
9 we believe that there are a number of other factors
10 which warrant an increase in the sports award and a
11 corresponding decrease in the MPAA award.

12 Let me just briefly touch on each of these
13 points. As to our study, we have carefully reviewed
14 what you said in the 1983 Final Determination and we
15 have sought to address each of the concerns that lead
16 the CRT in that proceeding to discount the constant
17 sum study that we presented and that others have
18 presented as well. In response, we have made certain
19 changes in our survey. They're designed to address
20 the concerns you raised. We are also providing expert
21 testimony establishing that other concerns are not
22 warranted, either because they apply, at least equally
23 if not with greater weight, to the MPAA viewing study
24 or because they simply are not the types of concerns
25 that are recognized by market researches or in the

1 industry generally.

2 We offer expert testimony that provides,
3 we believe, a strong basis for the Tribunal's relying
4 on the concept for the constant sum technique. I
5 think it's important to emphasize here, the constant
6 sum is not a creation of the Joint Sports Claimants
7 or of these proceedings. It is a recognized, well
8 accepted, well utilized market research technique that
9 is applied in many other settings other than just here
10 before the Copyright Royalty Tribunal.

11 We also offer expert testimony, we
12 believe, that provides the Tribunal with a strong
13 basis for relying on the particular constant sum
14 survey that is before you. I think the testimony will
15 show this survey is very carefully designed,
16 professionally implemented, and an unbiased survey
17 that follows accepted methodological principles. As
18 to the MPAA study, we believe that there are a number
19 of factors that will support the Tribunal's according
20 lesser weight to the MPAA study.

21 Now, we've already touched on some of
22 those during the past two weeks of cross examination
23 of the MPAA's witnesses. There are some
24 methodological problems with the survey. I think one
25 thing to emphasize in particular is the failure of the

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1 MPAA to address certain of the CRT's concerns. Let
2 me give one example. You have expressed a concern
3 over the years with the representativeness of four-
4 cycle data and you have asked the MPAA for information
5 about the representativeness. The MPAA has a ready
6 source to provide you with that kind of information.
7 Nielsen, as they have testified, has a national sample
8 where they measure audience data 12 months out of the
9 year. They also have a number of markets where they
10 provide metered measurements on a 12-month basis. If
11 they want to derive useful information about
12 representativeness of four-cycle data, they had it
13 there before you and they haven't presented it here
14 in this proceeding.

15 What they have done is they've come back
16 again with their six-cycle data and I submit it makes
17 a lot of sense for them to do that only because they
18 always look better on six-cycle data than they do on
19 four-cycle data. When you advance a formula such as
20 MPAA has advanced, three or four points difference
21 between four-cycle and six-cycle data become quite
22 important.

23 We've also shown and what we'll show
24 further as we go through these proceedings, that there
25 is an increasing lack of reliance on the industry

1 itself, on diary based data. We see, for example,
2 that the Nielsen has moved away from relying upon
3 diaries as the basis for its national measurements;
4 it was part of NTI. And we see also that Nielsen has
5 moved away from relying upon diaries in major markets.
6 Each year, as Mr. Cooper testified, a couple of more
7 markets come in with meter-based information as
8 opposed to diary based information. And I submit the
9 reason for that is clear. It has to do with the
10 problems of relying upon diary based data.

11 There's also increasing lack of reliance
12 on the type of viewing data that MPAA has submitted
13 in this proceeding and I think it ought to be clear.
14 The concept, the household viewing hour concept that
15 goes to the heart of the MPAA study is MPAA's
16 creation; their invention to use the words of Mr.
17 Cooper. This is a concept that is not used anywhere
18 else in the industry. The only source that it has of
19 usefulness, or has had of usefulness for the past has
20 been here before the Copyright Royalty Tribunal. No
21 one else relies upon concepts of household viewing
22 hours.

23 And another point that I touched on
24 earlier, and let me just emphasize again, is that
25 several of the concerns the Tribunal had expressed

1 with respect to our constant sum survey apply equally,
2 if not with greater weight, to the constant sum -- to
3 the viewing studies submitted by the MPAA.

4 Very briefly, our third point is that
5 there are additional considerations here the support
6 an increase in the sports award. One that you will
7 hear more about through our direct case is that
8 baseball and basketball had reached levels of
9 popularity in the late 1980s that far surpassed
10 anything that they had achieved in prior years and
11 this was reflected in the types of television rights
12 agreements that we were able to negotiate out in the
13 free market place. The reverse is true with respect
14 to syndicated programming, as Mr. Valenti also
15 testified last week, time were not good for us.

16 Secondly, the sports carrying super
17 stations, the particular signals on which we have
18 historically placed principal reliance, reached record
19 levels of distant carriage in 1989. They accounted
20 for a much greater proportion of the distant signal
21 market place in 1989 than in any preceding year.

22 Finally, we believe that the numbers in
23 the MPAA viewing study under represent the amount of
24 viewing that goes to major sports, but notwithstanding
25 that fact, it is true that even the MPAA's 1989 survey

1 shows that we have numbers that are higher than in any
2 years in the past. And that's true whether you're
3 looking at six-cycle or four-cycle, whether you look
4 at their time versus viewing comparisons, or average
5 households, or total number of household hours.
6 Anything that they have advanced here, or at least
7 anything that are advanced only after the Tribunal
8 ordered them to produce four-cycle and six-cycle data
9 for all of the claimant groups shows better numbers
10 for sports.

11 Now, over the next two weeks we will
12 present to you a total of nine witnesses, each of whom
13 will approach the issues before you from a somewhat
14 different perspective. Both the Commissioner of
15 baseball, Fay Vincent, and the Commissioner of
16 basketball, David Stern, will testify. It's important
17 to note the Commissioner Vincent, prior to become the
18 Commissioner of baseball, had spent most of the 1980s
19 as the head of Columbia Pictures. I think this will
20 be the first time that anyone has testified in these
21 proceeding, certainly who has the dual perspective,
22 having been in the motion picture industry and in the
23 sports industry. Commissioner Stern also brings a
24 special perspective here in that he has actually
25 negotiated in the market place cable television,

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1 broadcast television contracts and I think has a good
2 sense of the value of -- of sports rights and sports
3 rights on television.

4 We'll also present Bob Wussler who was the
5 chief executive officer of super station WTBS in the
6 late 19 -- through most of 1980s, actually, and Roger
7 Werner, who was the chief executive officer of ESPN
8 in the late 1980s. And both of these men have had
9 extensive experience in negotiating for sports and
10 other types of television programming and marketing
11 that programming to cable operators.

12 We'll also present Doctor Robert Crandall
13 who is an economist with Brookings; , Professor Leonard
14 Reid, the University of Georgia School of
15 Communications; and Doctor Samuel Bork who's an
16 economist and head of the market research division of
17 what I believe is the oldest cable television
18 consulting firm in the United States.

19 Each will address concerns that the MPAA
20 had raised with respect to the constant sum survey in
21 the 1983 proceeding, and concerns that were largely
22 accepted by the -- the Tribunal.

23 We'll also present, at the end of our
24 case, Doctor Peter Lemieux, instructor at MIT, who
25 will offer some statistical data, particularly as to

1 the amount of super station carriage, data that I
2 trust that the Tribunal also will find useful.

3 And, Mr. Chairman, I believe that leads
4 us to our first witness, Mr. Bortz's and I'll get him
5 to state his qualifications during his testimony.

6 Unless there are any questions, I will
7 conclude.

8 CHAIRMAN AGUERO: Thank you, Mr. Garrett.

9 Any questions, Commissioner? Any
10 question, Commissioner?

11 MR. GARRETT: Thank you.

12 CHAIRMAN AGUERO: Thank you very much.
13 Thank you very much.

14 Mr. Paul Bortz.

15 How are you? Good morning.

16 THE WITNESS: Good morning.

17 CHAIRMAN AGUERO: Welcome to the Tribunal.
18 Whereupon,

19 PAUL BORTZ

20 was called as a witness by Counsel for the Joint
21 Sports Claimants and having been first duly sworn,
22 assumed the witness stand, was examined and testified
23 as follows:

24 CHAIRMAN AGUERO: Thank you, sir.

25 DIRECT EXAMINATION

BY MR. GARRETT:

1
2 Q Mr. Bortz, would you state your name and
3 business address for the record, please?

4 A Yes, my name is Paul Bortz. I'm President
5 of Bortz & Company. We're located in Denver,
6 Colorado, 1515 Arapaho Street, Denver, Colorado.

7 Q Mr. Bortz, let me ask you to turn to the
8 resume that is attached to your testimony in this
9 proceeding. I believe that may be found behind Tab
10 C in the notebook containing our direct case. Do you
11 have that before you?

12 A Yes, I do.

13 Q Mr. Bortz, you're President of Bortz &
14 Company, correct?

15 A Yes.

16 Q Could you describe the nature of the
17 business that Bortz & Company is engaged in?

18 A Yes, our practice is concentrated
19 primarily in the areas of broadcast television, cable
20 television, and professional sports, a number of
21 aspects of professional sports. The types of work
22 that we do includes developing business plans for new
23 cable services, the economics of programming and
24 program development, cable operator demand for cable
25 television programming. I am directly involved in the

1 valuation and negotiation of sports rights and both
2 for major sports leagues entities and a number of
3 professional sports franchises. We do the financial
4 evaluation for cable operators, broadcasters and banks
5 related to both cable television and broadcast
6 properties, stations and systems.

7 A major area of our work is market
8 research which focuses on the consumer demand for
9 cable, how to price it, what mix of programming to
10 use, how to package that programming. We do that for
11 major national entities, trade associations in cable,
12 and some of the major cable operators as well as the
13 owners of major cable networks.

14 Q Mr. Bortz, on your resume you describe
15 some of the particular research assignments that have
16 been entrusted to Bortz & Company over the years. I
17 wonder if you could just briefly explain the nature
18 of those assignments?

19 A Well, they fit into the general categories
20 that I just described. To give you an example, we
21 completed a few years ago, two years ago, a study for
22 the National Association of Broadcasters entitled
23 "Sports on Television." I believe that is submitted
24 in the direct case as -- would that be Tab 8?

25 Q That's Sports Exhibit 8?

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A Sports Exhibit 8.

Q Do you have Sports Exhibit 8 there before you?

A I do not. No.

Q Okay.

A But that was a broad look at sports on television. It's used by broadcasters, by cable, how it's valued and essentially how to go out into the market place and negotiate for sports television rights. We have been doing work for the Cable Television Advertising Bureau on behalf of the major cable networks. We were looking at what might happen should cable television rate regulation reappear in terms of basic rates and how operators might approach the tiering and packaging, and pricing of their services. We have done a lot of work for the Cable Television Administrative and Marketing Society, known as CTAM, which looks at the attitudes of cable subscribers towards their cable service so that the cable operators can -- can improve their ability to attract new subscribers and retain existing subscribers.

I think those are examples of the kind of work we do.

Q Would you give us examples of some of the

1 particular clients that you perform research for over
2 the past several years?

3 A Well, we've worked for a number of the
4 national associations, the National Association of
5 Broadcasters. I mentioned Sports on TV but we've done
6 other studies for them as well. The National Cable
7 Television Association, the Association of America's
8 Public Television Stations which is the, essentially
9 the trade association for the public television
10 stations in the country. I had mentioned the CTAM,
11 the Cable Marketing Society, and the Cable Advertising
12 Bureau. In terms of cable operators, our clients have
13 included most of the large cable operators including
14 United, now United Artists Cable, ATC which is part
15 of Time-Warner Cable, Continental Cable COMCAST.

16 Our cable program clients who had cable
17 networks include ESPN, Lifetime, The Weather Channel,
18 and E which is an entertainment programming network.

19 Broadcasters who are clients include ABC
20 who was my client from Day 1 when I left Washington,
21 D.C. after -- after my stint at Commerce, and now
22 CapCity is ABC; Group W and PBS, Public Broadcasting
23 Service.

24 Syndicators who have been our clients
25 include LBS and Multimedia, both major program

1 syndicators. Major banks call us in to assist with
2 lending with respect to cable properties and
3 assistance, broadcast stations, and investments in new
4 cable services, and those clients include CitiBank and
5 Bank of America.

6 With respect to sports, our clients have
7 included major league baseball, the National
8 Basketball Association, the National Hockey League,
9 and franchises in each of those leagues.

10 Q Mr. Bortz, your resume states that you
11 founded Bortz & Company in 1988, is that correct?

12 A That's correct.

13 Q Could you just very briefly describe the
14 nature of your work experience prior to 1988?

15 A Yes, prior to 1988 I was Managing Director
16 and Chief Executive Officer of Brown, Bortz and
17 Conigdon, BBC. That's the firm that did the survey
18 that was in your 1983 proceeding. And I was one of
19 the founding directors of that in 1979. Basically
20 what happened in 1988 was that the sports and
21 television practice came with me over to Bortz &
22 Company. The company that I managed before also had
23 practices in health care, natural resources, and
24 regional economics.

25 Prior to my establishing a consulting

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1 practice at BBC in '79, I was Deputy Assistant
2 Secretary of Commerce for Communications and as that
3 served as Deputy Administrator of NTIA, the National
4 Telecommunications and Information Administration.
5 That was in 1978 and '79. And prior to that, I headed
6 the Industrial Economics Division at the University
7 of Denver's Denver Research Institution from 1969
8 until coming to Washington in 1978. It was while at
9 the Institute, starting in 1972, that I did my first
10 work in the cable and broadcast television industry.
11 Our major client in the initial years there was the
12 old White House Office of Telecommunications Policy.

13 MR. GARRETT: Mr. Chairman, that concludes
14 my examination on the qualifications of Mr. Bortz and
15 I would make him available for voir dire at this time.

16 CHAIRMAN AGUERO: Voir dire, any voir
17 dire? From Music?

18 MR. KOENIGSBERG: No questions.

19 CHAIRMAN AGUERO: NAB?

20 MR. STEWART: No questions.

21 CHAIRMAN AGUERO: PBS?

22 PBS CLAIMANTS: No questions.

23 CHAIRMAN AGUERO: Devotional?

24 DEVOTIONAL CLAIMANTS: No questions.

25 CHAIRMAN AGUERO: Proceed, Mr. Garrett.

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1 MR. GARRETT: Thank you, Mr. Chairman.

2 BY MR. GARRETT:

3 Q Mr. Bortz, as a preliminary matter, let
4 me hand you a copy of Sports Exhibit 8 and ask that
5 you identify that for the record, please.

6 (Whereupon, the witness was proffered the
7 document.)

8 THE WITNESS: This is the copy of the
9 summary sections of the reports that we prepared for
10 the National Association of Broadcasters. It was
11 presented at their national convention and distributed
12 widely among broadcasters and others.

13 BY MR. GARRETT:

14 Q And that is the report that you referred
15 to a moment ago?

16 A Yes sir, that is.

17 Q And this report was prepared pursuant to
18 your supervision and direction?

19 A That's correct.

20 Q Let me ask you now to turn to Sports
21 Exhibit 1, Mr. Bortz. Do you have that before you?

22 A That's the report? Yes, I do.

23 Q Could you just very briefly identify that
24 for the record, please?

25 A This is a report that we prepared for the

1 Joints Sports Claimants which presents the results of
2 our constant sum survey of cable operators.

3 Q And that report was prepared pursuant to
4 your supervision and direction?

5 A Yes, it was.

6 Q Mr. Bortz, just by way of summary here and
7 before we launch into the report in detail, could you
8 explain for the Tribunal's benefit the purpose for
9 which you were retained by the Joint Sports Claimants?

10 A Yes. Stated most simply, it was to obtain
11 the comparative valuation of different program types
12 that cable operators would make for distant signals
13 and on that work programming carried by them in 1989,
14 and to obtain that through their allocation of a fixed
15 program budget.

16 Q Could you very briefly describe the
17 results of the research which you undertook?

18 A Yes. Well, first of all, the approach was
19 to conduct a statistically balanced survey of the
20 operators, a sample design selected to be
21 representative of the whole universe of operators, and
22 it was to project to the universe. And what we found
23 there in a key question where we asked them to
24 allocate a fixed program budget was that they had
25 found sports to be the most highly valued.

1 If we could put up a chart which
2 illustrates that? Is that chart high enough so you
3 can see that?

4 What we found here is that the highest
5 allocation that we've appropriately combined across
6 systems here, highest allocations given to live
7 professional and college sports is 34 percent. Movies
8 was very close in valuation, somewhat less but very
9 close to the valuation given to professional sports.
10 You can see we included seven categories, categories
11 that we found pretty well subsumed the total responses
12 that we got from cable operators and so we have lower
13 values here for syndication at 16.9 percent news and
14 public affairs, and about 12 percent. And then also
15 devotional/religious public broadcasting and Canadian.

16 Q A lot of preliminary questions, Mr. Bortz.
17 The nature and results of the research that you
18 undertook are accurately and completely set forth in
19 Sports Exhibit 1?

20 A Yes, they are.

21 Q Let me turn first to the methodology that
22 you utilized in conducting this research. Would you
23 tell the Tribunal, what was the first step that you
24 undertook?

25 A The first step was to review the findings

1 of this Tribunal in that we had submitted a report in
2 the 1983 proceedings and we reviewed that as a result
3 of the criticisms that were contained in the findings.
4 We made certain modifications to the survey approach.
5 To assist us in that, we engaged outside experts who
6 helped us modify the questionnaire in order to be
7 responsive.

8 Q Mr. Bortz, I'd like to come back a little
9 later to the specific changes that were made in the
10 questionnaire and how you responded to the CRT's
11 concerns, but before we get to that, let's just move
12 to the next step. You did conduct a pilot test of the
13 revised survey questionnaire, did you not?

14 A Really, the next step was to select a
15 stratified random sample. And to do that, we will--
16 I can talk a bit about the nature of the
17 stratification. First of all, we wanted to find the
18 best available data on copyright payments to enable
19 us to do a timely survey. One of the criticisms of
20 the '83 study was that it was done well after 1983.
21 So we used the best available data in order to do a
22 timely survey. That was data from the 88-2 filings.
23 The 88-2 really gave us a picture of the cable
24 television industry as it entered 1989. Now,
25 questions could be raised about why not 89-1 or 89-2.

1 We can go into that but basically, you couldn't do
2 that and also be timely to conduct the survey in '89
3 and have a complete set of data.

4 What we did do was go back, after the
5 fact, retrospectively, and take a look at 88-2 versus
6 the 89-1 and 2, and particular 89-2 and what we found
7 was there was very little difference, on the order of
8 a couple of percentage points difference, very little
9 difference between the constitution of the Form 3
10 systems in 88-2 and 89-2. So that allowed us to do
11 it in a timely way.

12 We stratified the sample. Now why do we--
13 what is stratification, why did we bother to stratify
14 the sample? Well, most cable systems are small and
15 the royalties paid vary a lot by the size of the
16 system. If we were to survey just randomly, then
17 without a doubt we'd end up with an over
18 representation of low royalty paying systems. So what
19 we wanted to do was to represent the universe, and so
20 we divided that. And there's some statistics in
21 there, I won't attempt to go into that with you, but
22 we used appropriate statistical procedures to
23 stratify. Why? Very simply. One point eight percent
24 of the systems, 1.8 percent, account for 18 percent
25 of the royalties that were paid in in 88-2. And

1 that's our highest strata, strata 4. On the other
2 hand, 66 percent of the systems account for about the
3 same amount, 20 percent of the revenues. So, we have
4 63 percent of the systems paying in total dollars that
5 equal what 1.8 percent do. We want to make sure that
6 we have enough of those 1.8 percent in our sample to
7 see how they would value the programming and properly
8 weight it and not have too many of the 63 percent who
9 each pay in just a little bit.

10 Q Mr. Bortz, you may have touched on this
11 earlier, but just so it's clear for the record, why
12 did you do a random sample?

13 A Well, it was key that we do a random
14 sample so that we could then project the results of
15 our survey to the universe of systems. And if it was
16 not a random sample, you could not adequately project
17 to what the whole group of systems would be.

18 Q And the particular universe you focused
19 on were Form 3 systems, correct?

20 A Form 3 systems which account, I
21 understand, for approximately 98 percent of the
22 royalties that are paid into the Tribunal. We did not
23 include the Form 1 and 2 systems at 2 percent, and
24 obviously you would make some appropriate adjustment
25 for that.

1 Q Mr. Bortz, I'd asked you earlier about a
2 pilot test.

3 A Yes.

4 Q Was that test conducted after the sample
5 was polled?

6 A Yes. What we did was then after we had
7 pulled the sample, we selected 23 systems for pilot
8 test. We had them evenly represented across the
9 different strata. It was an attempt to find out
10 whether or not there were any difficulties in
11 administering the questionnaire or any confusion among
12 respondents in terms of the questionnaire.

13 We completed 18 of the 23 systems and we
14 found only very minor modifications made to the
15 questionnaire, not in terms of anything asked to the
16 respondent but only in terms of instructions to the
17 interviewer. So it was just housekeeping changes that
18 we made.

19 Q Mr. Bortz, Bortz & Company performed the
20 pilot survey, did it not?

21 A Yes, our staff did that.

22 Q And how was the survey conducted for the
23 entire sample?

24 A Well, at the point after completing the
25 pilot test we engaged Burke Market Research, which is

1 one of the largest market research companies in the
2 country, to perform this. We did this for a number of
3 reasons. They are a highly qualified firm to do this
4 kind of market research. Burke never had any idea as
5 to the identity of the client or the purpose of the
6 survey. All they knew was that Bortz & Company wanted
7 them to do this survey, so it was not related in
8 anyway to the Copyright Royalty Tribunal nor to the
9 sponsors, the Joint Sports Claimants.

10 What we did was to -- I had Jim Troutman,
11 who is here with me today and who is a Vice President
12 in our firm, went to Cincinnati, which is where Burke
13 is based, to train the interviewers. I participated
14 in the initial training session by telephone where we
15 ran through, first of all, background, a little
16 background on the cable industry and what is a distant
17 signal and what is a cable network versus a distant
18 signal, and what's the difference between a distant
19 signal and local. And went through a detailed
20 training. And then Jim listened into interviews that
21 were done by the interviewers so that he could make
22 sure that it was being administered correctly.

23 And after monitoring that, they then
24 proceeded through the month of December and into early
25 '89, in January, February and the first week of March,

1 to complete 187 interviews.

2 Q Do you know what percentage of the
3 interviews were completed in 1989 itself, Mr. Bortz?

4 A Yes. Sixty percent of the interviews were
5 completed in 1989 itself. The remaining 40 percent
6 were completed in the first, roughly, nine or ten
7 weeks of 1990.

8 CHAIRMAN AGUERO: Sixty percent in 1989?

9 THE WITNESS: Sixty percent in 19 --

10 CHAIRMAN AGUERO: From December the 1st
11 to December 31st 1989?

12 THE WITNESS: Yes, that's correct.

13 CHAIRMAN AGUERO: The other 40 percent
14 from January the 1st to March '88?

15 THE WITNESS: Yes. What happens is, there
16 are people you can reach quickly and on your first
17 call you tend to. There are others who, because of
18 their job duties, are more difficult to get hold of
19 or it just takes more call backs. And so you get --
20 when you do survey research, you get that first
21 response, first bunch easily and then you have to call
22 back and call back and call back in order to get a
23 high response rate.

24 But high response rate, in my opinion and
25 I think in the opinion of anybody who is knowledgeable

1 in survey research, is very crucial because you want
2 to make sure that you aren't systematically missing
3 certain people. If you have a low response rate,
4 you'd then, in order to draw any conclusions, have to
5 know what were that -- that group we couldn't get,
6 what were they like? Were they different than our
7 whole group?

8 So by getting 80 percent, we were really
9 assured that we had a representative sample.

10 COMMISSIONER ARGETSINGER: That 20 percent
11 that didn't respond, did they just refuse, they didn't
12 want to participate, didn't want to take the time or
13 what?

14 THE WITNESS: Typically -- typically they
15 refused to participate.

16 COMMISSIONER DAUB: Mr. Bortz, can we
17 backtrack just for a minute?

18 THE WITNESS: Sure.

19 COMMISSIONER DAUB: And clarify this for
20 me. Is it my understanding that you have conducted
21 your survey on stations that carry the Form 3? Only
22 Form 3?

23 THE WITNESS: On Form 3 systems. Only
24 Form 3 systems.

25 COMMISSIONER DAUB: Only Form 3.

1 THE WITNESS: Yes.

2 COMMISSIONER DAUB: So the strata that
3 shows on page 24 of your testimony is increments of
4 5,000?

5 THE WITNESS: What was the page number
6 again? I'm sorry.

7 COMMISSIONER DAUB: 24. Did you find
8 that?

9 THE WITNESS: Yes.

10 COMMISSIONER DAUB: Under the royalty
11 stratum the zero dollar means it's not zero dollar?

12 THE WITNESS: It's not -- it's not really
13 zero dollars, that's right.

14 COMMISSIONER DAUB: Okay.

15 THE WITNESS: That's correct. Form 1 and
16 2 are excluded. And what we did is in selecting the
17 sample in looking at the payments that were made, I
18 believe the number was like \$2190, which is the cutoff
19 on Form 2. We selected sample for systems who paid
20 more than \$2190. So that to be literally correct, it
21 should be \$2190 to 31,000.

22 COMMISSIONER DAUB: Thank you.

23 BY MR. GARRETT:

24 Q Mr. Bortz, one other question in response
25 to Commissioner Daub's inquiries, can you explain

1 again why you focused on just Form 3 systems for your
2 sample?

3 A Yes. And that is because these systems
4 comprised 98 percent of the royalties. To sample the
5 others it would be a very large sampling procedure and
6 we would only be talking about another 2 percent of
7 the royalties.

8 Q Mr. Bortz, you've indicated that
9 approximately 60 percent of the interviews were
10 completed in calendar year 1989. Do you recall that?

11 A That's correct.

12 Q Have you had an opportunity to look at the
13 results of your research here and compare it between
14 the 60 percent who responded in 1989 and the 40
15 percent who responded in 1990?

16 A Yes. What we did was to statistically
17 compare the answers that were received from the 1989
18 60 percent and the answers in other group of 40
19 percent. And there are statistical tests that can be
20 run to say is there any difference between these two
21 groups. And there was no significant statistical
22 difference between the two groups, which says that we
23 can, in fact, assert that they are the same.

24 Q You'd also referred a moment ago to
25 response rate of approximately 80 percent. Do you

1 recall that?

2 A Yes.

3 Q Could you explain to the Tribunal how you
4 arrive at that particular response rate?

5 A Well, we achieved it through a number of
6 call backs --

7 Q I'm sorry. My question wasn't clear. Let
8 me just start, how many systems were in the random
9 sample altogether?

10 A Okay. We started, first of all, with a
11 universe of 1977 Form 3 systems in the 88-2. From
12 that 1977, we then followed a sampling procedure out
13 of which we had selected 237 systems to be sampled.

14 The 80 percent is 187 completed interviews
15 on the key question, which is the allocation of a
16 distant signal budget; 187 completed interviews over
17 237 is essentially a 79 or 80 percent response rate.
18 For a couple of the other questions in the survey, the
19 response rate was a bit higher, took us up to 84
20 percent.

21 COMMISSIONER DAUB: They were not 244
22 stations?

23 THE WITNESS: Well, there are 244 to begin
24 with. That's what we drew from the sample. Then when
25 we went to the Statements of Account we found that

1 five of the systems, there was not signal carriage
2 data so we couldn't administer the survey.

3 One of the systems was what is called a
4 wireless cable or MMDS system. And another one was
5 a satellite service provider. So we had to drop those
6 seven, that took us to 237.

7 CHAIRMAN AGUERO: Do you have the list of
8 the 187 cable systems?

9 THE WITNESS: I'm sure we can produce a
10 list.

11 CHAIRMAN AGUERO: Location, the cities and
12 number of subscribers?

13 THE WITNESS: I believe we have provided--

14 MR. GARRETT: Mr. Chairman, we, pursuant
15 to earlier Tribunal orders, had turned over the
16 completed questionnaires to the Tribunal. And, of
17 course, all of that information is contained on those
18 questionnaires. We do have our own list.

19 We have not produced the listing of the
20 187 cable systems for the public record. As we have
21 indicated in past filings, any information that would
22 identify the particular respondents it would be
23 considered confidential information. All of this
24 information was taken pursuant to accepted standard
25 industry practices of assuring confidentiality.

1 I will state for the record, I believe as
2 the Tribunal knows, that we have turned over to Mr.
3 Larson pursuant to confidentiality agreements all the
4 questionnaires that include the identifying
5 information so that any of the parties here may run
6 whatever types of analyses they want with respect to
7 our data.

8 Does that answer your question?

9 CHAIRMAN AGUERO: Are you telling me that
10 I withdraw my question?

11 MR. GARRETT: Never. Never, Mr. Chairman.

12 COMMISSIONER DAUB: But perhaps Mr. Bortz
13 could explain very briefly as how that random sampling
14 itself has been taken.

15 THE WITNESS: Sure.

16 COMMISSIONER DAUB: I do understand that
17 you've taken 62 from the lowest, 66 at stations in 81
18 and then 35 stations over 300,000 or more. But, like
19 you said, we have approximately 2000 or 1,990 some
20 stations and you've arrived 247.

21 THE WITNESS: All right. First of all,
22 let me say that the systems in our sample account for
23 20 -- the systems themselves that responded, account
24 for 27 percent of the total royalties paid in. So,
25 if we're looking at our sample in terms of the

1 royalties paid, actually included in our sample, our
2 survey, was 27 percent of the total royalties. That
3 compared with, say, Nielsen viewing study that might
4 try to project from 1/10 of one percent of households.
5 We're projecting from already having the data on 27
6 percent up to a 100 rather than the tenth of one
7 percent.

8 Doctor George Bardwell, who is a
9 statistician who has testified often back here in
10 Washington who is someone that I have worked with for
11 almost 20 years, designed this sampling procedure in
12 order to give us the highest levels of accuracy. He
13 has things in here like the cum square root of f rule
14 and I don't --

15 COMMISSIONER DAUB: We've seen that.

16 THE WITNESS: I don't understand it.

17 MR. GARRETT: I'll be available to explain
18 later on this one.

19 THE WITNESS: You'd better talk to George
20 about it.

21 But basically what it is, is the idea is
22 we want to make sure that you have to sample very
23 highly those who pay in a lot of royalties because if
24 you make a mistake there, it's a big mistake if you
25 don't get those very thoroughly. Those who

1 individually pay in just a little bit on a
2 proportionate basis, you can be off a bit more. So
3 he looks at this, goes through certain statistical
4 analyses. Came back to us and said of the strata 1
5 systems, the 1254, I want you to select randomly, and
6 there are techniques that --

7 COMMISSIONER DAUB: That random means
8 demographics enter into the picture?

9 THE WITNESS: No. It's -- each -- each
10 of the systems has a number and then we use
11 essentially a random number table. I'm simplifying.
12 So that when we select from among those 1254 there's
13 no bias. We don't take every third one or anything.
14 It steps you through it in a random sequence so that
15 you don't, in fact, try and control for certain
16 things, because that can introduce bias. So we make
17 no attempt to control for well this is an area where
18 sports is going to be real important or, you know,
19 something like that.

20 COMMISSIONER DAUB: Well, the geographic--

21 THE WITNESS: No geographic controls.
22 What we are controlling for is what the Tribunal has
23 to control for, which is royalties. Royalties is the
24 primary control.

25 I can describe in some detail later other

1 things that we went back retrospectively and saw,
2 looked it and said yes this really does represent the
3 universe quite well.

4 We take from the lowest royalty strata one
5 out of every 20 systems. That's still a pretty good
6 sample, one out of 20. That's five percent, a lot
7 bigger than most samples.

8 For the second stratum we were to select
9 one out of every eight systems taking more of a sample
10 as they pay in more. For the third, it was one out
11 of every two. And for the fourth, every system was
12 included in the sample. And, as you say, if you take
13 -- if you look on that table on page 24, number of
14 systems: 1254. And if you would divide that by 20,
15 you get, low and behold, 62 and so forth. And so that
16 was the approach to develop the sample.

17 COMMISSIONER DAUB: Thank you.

18 BY MR. GARRETT:

19 Q I know we'll come to this later, Mr.
20 Boritz, but since the issue has been raised at this
21 point, you have taken a look at your results on a
22 nonstratified basis, have you not?

23 A Yes. Yes, we have.

24 Q And could you just explain to the
25 Tribunal's benefit what that review has produced?

1 A Okay. I believe you're referring to if
2 we were just to take the data and not weight it
3 according to the strata what would happen to these
4 results. I believe there is a table there, let me
5 find it.

6 If you go to page 11 of the report at the
7 top of the page, there we just took the 187. We
8 pretended like -- well, it was not weighted and what
9 would happen if we put together the unweighted
10 results. And what you find is that the percentages
11 do not change very much. You can see that table and
12 compare them to percentages; like sports 34.8 percent
13 versus 34.2. Movies 31.1 versus 31.

14 And I believe if you go back a couple of
15 pages to page 8 the results by stratum that explains
16 why the weighted and the unweighted are similar. And
17 what it is, is even though it's still crucial to
18 control for stratum, what we find is, certainly for
19 all of the major categories, that there isn't much
20 variation by stratum. And so that's why you can put
21 them together weighted and unweighted and get about
22 the same result, because after the fact we see that,
23 in fact, the valuation is fairly consistent across
24 system size.

25 Q Mr. Bortz, just to jump ahead for a

1 second, but it is the case, is it not, that you
2 performed a similar study here involving the year
3 1986?

4 A In 1986 we did. And this was, again,
5 responding to the concerns expressed by the Tribunal
6 in the 1983 proceeding. And we did that on a random
7 sampling basis, no stratification. So, here we didn't
8 control for the different system sizes. And if you
9 refer to page 12 of your report, on page 12 you see
10 a table there and the first column is Bortz & Company,
11 1986. That is a study that was done without this
12 stratification. There are variations. Sports is more
13 valuable than what we have in the stratified sample,
14 Movies are less valuable. But they're all still kind
15 of in the same range. Basically that sports is the
16 most valuable followed by Movies and then somewhat
17 behind that, certainly Syndicated and the other
18 program categories. That is not a methodology that
19 I believe is as useful in projecting ahead, but it is
20 there to give you an idea that, indeed, if we just
21 used a simplest approach we would get numbers that
22 were not greatly different, although they do favor
23 sports somewhat more.

24 Q Mr. Bortz, you mentioned earlier the
25 response rate of approximately 79 or 80 percent. How

1 does that compare to the response rates in other
2 studies with which you are familiar?

3 A Well, it's a very high response rate. It
4 is further enhanced, without going into the
5 statistics, by the nature of the sampling which
6 results in very -- very narrow confidence intervals.
7 In other words, that the results that we have posted
8 here are accurate to within typically a couple of
9 percentage points. So we're talking about narrow
10 intervals.

11 Many surveys have response rates that are
12 far below 80 percent. And as I think I indicated in
13 testifying in front of this Tribunal a few years ago
14 with respect to the '83 study, our statistical
15 consultant is a tough task master. He passed on the
16 80 percent, but he's a tough guy and I'm very pleased
17 with him.

18 Q All right. Let me ask you to turn for a
19 minute to page 28 of your report.

20 A Yes.

21 Q You mentioned confidence intervals a
22 moment ago, do you recall?

23 A Yes.

24 Q Is this to what you were referring?

25 A That what I was referring to. With

1 respect to question 4, which is the only one that
2 we've discussed in terms of results now, you see that
3 percent allocation numbers are the same as on the bar
4 chart that we have here.

5 The question then is if the statistician
6 says is "Well, we know that that's not exact. It's
7 a sample. If you surveyed everybody, what's the
8 likelihood that it's going to come out around your
9 number?" And what we can state is that with 95
10 percent confidence, in other words with only a five
11 percent chance of our saying something incorrectly,
12 we can say that the sports valuation is 34.2 percent
13 plus or minus 2 1/2 percent. So it could be if we
14 then say somewhere between 31.7 percent and 36.7
15 percent the true answer if we surveyed 1977 systems,
16 the true answer would be somewhere between that range
17 with only a five percent chance of our assertion being
18 incorrect.

19 Q Mr. Bortz, let me ask you to turn now to
20 the issues that were raised by the Tribunal's 1983
21 Final Determination and how you attempted to respond
22 to those concerns that the Tribunal had back in the
23 '83 proceeding, okay?

24 A Let me refer you to pages 6 and 7 of the
25 report, and just for summary purposes we have a chart

1 that puts the major categories up there.

2 This was concerns that you had expressed
3 and which I indicated earlier was the first task in
4 this study was to say what were the concerns, let's
5 consider them, what can we do to address them.

6 First, had to do with respondent recall.
7 If you might recall, our 1983 survey was conducted in
8 March of 1985, some 15 months after the end of '83.
9 And concerns were expressed about recall and how
10 accurate could that recall be.

11 What we did, as we indicated, was to
12 actually do the survey. Initiate it in '89, we did
13 60 percent of the responses in '89 and within ten
14 weeks into 1990 we had done the remainder of the
15 responses. So, that's how we dealt with that.

16 Q Incidentally, Mr. Bortz, you talked about
17 the repeated call backs in order to get this response
18 rate. Do you have any information on the numbers of
19 call backs that were made?

20 A Well, it varies. If I recall correctly,
21 I think the toughest one was 30 telephone calls were
22 made. Because they're in the sample, they're precious
23 to us and we don't want to lose them. And so we just
24 kept calling. And I think sometimes, you know, I can
25 understand why they don't want to talk to survey

1 people. They're busy. But Burke wore them down. We
2 insisted that they continue to do that.

3 Q Okay.

4 COMMISSIONER ARGETSINGER: Along that
5 question of calling back, how accurate were people
6 when they called back? For example, did any
7 respondents give you allocations and they added up to
8 130 percent? Did you have to correct them?

9 THE WITNESS: Well, first of all, our
10 interviewers were told to check that it added to a 100
11 percent. If it did not add to 100 percent, they were
12 to say that and it gave the respondent an opportunity
13 to revise it.

14 There was one, maybe two incidents that
15 I can recall, I don't recall the exact number, where
16 even with that the numbers did not add to 100. Then
17 that was not counted in the responses. So that would
18 not be in the -- in fact, it was just one. In the 187
19 there -- in getting down to 187, we started with 198
20 and we threw out one because of it not adding to 100.

21 COMMISSIONER DAUB: After 20 calls you
22 didn't decide to go on to another station?

23 THE WITNESS: No. We wanted to stay
24 within the random sample frame that had been
25 established and not to do anything to disturb that.

1 I suppose had we been unable to get up to a response
2 rate that was acceptable to Doctor Bardwell, that he
3 would have then designated us to go back and to draw
4 another full sample randomly and to call out of there,
5 in some manner. Fortunately, we didn't have to do
6 that.

7 But you couldn't just say, "Well, we
8 didn't get it, so let's try another one from this
9 stratum." I mean, that would not be appropriate.

10 The second area of concern deals with
11 program budget allocation. In our 1983 questionnaire
12 we asked the respondents to allocate 100 percent of
13 the value, 100 percent of the value of programming.
14 And the Tribunal expressed concern that that was sort
15 of vague, what is that? I mean, it's not anything
16 they're spending, what are they thinking of when
17 they're allocating 100 percent of the value? And we
18 felt that was a good criticism.

19 And what we do know, because we work
20 closely with operators, we had for a period of years
21 with Arthur Andersen & Company done a detailed
22 analysis of the revenues and costs of cable systems
23 and we work with operators at the system and at the
24 corporate level. And we know that they managed to
25 budget. This is a cash flow management business, the

1 cable business. So we said, okay, how would you
2 allocate a fixed program budget? So each system could
3 think in terms of what they spend on programming,
4 which they know is a line item in their budget, how
5 would you allocate a fixed program budget for distant
6 signals across these types. And that's how we
7 responded to that. That was very concrete and by
8 making them in the constant sum technique allocate a
9 fixed budget, then we avoid the biases of anything
10 that doesn't use constant sums because if you don't
11 have a budget, you'll spend. Right? You'll be -- if
12 you like things, you'll just keep spending. If you
13 say it's a fixed budget, pay this you can't do more
14 than 100 percent, you got to take away from one to
15 give to another, we believe that that represents it
16 accurately. And so that's how we addressed that
17 concern.

18 The third concern expressed was that our
19 program categories did not address all the claimants.
20 And so what we did there was to make sure that we
21 added a religious devotional category and a category
22 for Canadian programming. Those were the two. So
23 instead of five categories that we used in the 1983
24 study, we used seven in order to include all the
25 claimants in what we did.

1 And then with respect to the other areas,
2 questions were raised -- well, let me go on to the PBS
3 Canadian valuation. Question was raised there if the
4 system in Mobile, Alabama is not carrying Canadian
5 programming, we don't ask them to value Canadian
6 programming. And a question was raised, is that
7 appropriate. And we thought about that. Basically
8 a system, talking about '89, a specific year, they
9 didn't carry Canadian programming. Let's say they
10 didn't carry a distant public broadcast station. They
11 weren't asked to allocate it and we didn't ask them
12 to allocate it in the '89 study because they couldn't
13 have. If they didn't carry the station, they couldn't
14 allocate that fixed budget to the station.

15 To include it would be reasonable if
16 you're asking those prospectively to say in the future
17 if you were going to carry and maybe change your
18 carriage what would you allocate to PBS. That's fine.
19 But we're talking about '89 where they made payments
20 on a specific set of stations they carried and if it
21 wasn't Canadian, it wasn't PBS, we didn't ask them to
22 allocate to it.

23 So we decided that the approach that we
24 had used in '83 we should continue to use in '89.

25 BY MR. GARRETT:

1 Q Mr. Bortz, what signals did you ask them
2 about?

3 A Well, all of the systems were asked about
4 the other five categories that we had, which would be
5 Live Professional College Sports, Movies, Syndicated
6 News and Public Affairs -- I don't have them all here
7 -- and the fifth one.

8 Q You asked them about the different
9 categories of programmings on particular distant
10 signals, is that correct?

11 A That's correct.

12 Q And which distant signals were they?

13 A It was -- the questionnaire was designed
14 specifically to say -- to tell them from the
15 Statements of Account you're carrying these distant
16 signals. We then gave them the opportunity to -- we
17 asked, "Did you in '89," because remember we proceeded
18 from the '88 two Statements of Account -- "Have you
19 added any signals since then? Have you dropped any
20 signals since then?" So we had an opportunity for
21 them to update the list so that it was an '89 list.

22 And then in going through the question
23 where we asked them to value, we again repeated these
24 are the stations that you're carrying, distant signal
25 stations. These are the ones that you're carrying and

1 then asked them to value. So it was clear to them
2 what the compliment of systems was.

3 COMMISSIONER ARGETSINGER: In your sample
4 do you recall, maybe you've said in here, what the
5 average number of distant signals carried was?

6 THE WITNESS: I don't recall that. We did
7 run a -- there was run, we didn't do it but there was
8 run a comparison of our sample and their mix of
9 signals; numbers carried, numbers -- numbers of
10 independents, number of additional affiliates. And
11 that was compared against the universe.

12 COMMISSIONER ARGETSINGER: Was there a
13 great variety, would you say?

14 THE WITNESS: We matched the universe in
15 every case except one, and that was public broadcast,
16 distant public broadcast stations where they were
17 under represented in our sample.

18 BY MR. GARRETT:

19 Q Mr. Bortz, you say you asked the cable
20 operators whether they had added or dropped any
21 distant signals. Do you think that cable operators
22 were able to respond accurately to a question of that
23 nature?

24 A Yes. We were talking to the person most
25 familiar with programming at the system. In fact, 80

1 percent of the respondents, the individuals that we
2 talked to, were either the general manager of the
3 system, the marketing vice president, marketing
4 director or the programming vice president,
5 programming directors. So, these were people that
6 were highly knowledgeable about distant signal
7 compliment.

8 Q All right. Have any comparisons been done
9 between the particular signals that were carried in
10 88-2 by your 187 systems and the distant signals that
11 were actually carried in 1989 by these 187 systems?

12 A I don't recall the specifics of that, but
13 a comparison was done and it matched very closely the
14 compliment signal.

15 Q Okay. Thank you.

16 I believe there was one final area that
17 you wanted to address concerning the CRT's concern?

18 A Yes. Well, the other key area really was
19 based on concerns as we mentioned that we had --
20 already had put in the detailed station listing, but
21 we didn't have definitions of the program categories.
22 And a question was raised as to whether we should
23 present definitions.

24 Now, I've looked at, I don't know, is it
25 the MPAA's definitions that I saw? Somebody's in this

1 proceeding. That it was sort of paragraph
2 definitions, and that's one way of doing it.

3 There were several reasons why we decided
4 not to proceed with the definitions. Number one, we're
5 dealing with a sophisticated group of respondents,
6 people who are in the business, read the trade mags,
7 talk to each other.

8 First of all, Live Professional and
9 College Sports is very clear. Movies, well, you might
10 call it classic movies, foreign films, but Movies is,
11 I think, quite clear. Syndicated is somewhat more
12 difficult. And so the question arose, well, you know,
13 should we in some of these categories where it's not
14 as clear do it. All we can say is that, and I'll get
15 into the results of some of the other questions.

16 In question two, which was one about
17 popularity with subscribers, that was a question that
18 was asked unaided. That meant we didn't mention our
19 categories and we told the interviewers that if they
20 had any uncertainty at all and they got a response,
21 they were to write it down if it didn't fit the
22 category.

23 What we found was in question two, and it
24 was consistent with what we found in '83, question two
25 93 percent of the responses fit right in our

1 categories. The others, which we can go into at some
2 point, we've listed here. They were told to
3 categorize as others and then we went through it and
4 sort of recategorized it.

5 With a 93 percent response in an unaided
6 way to our categories, we think that they fit. And
7 with just my experience in the industry, these are
8 categories that television people understand. And to
9 go to a definition, you're going to get the respondent
10 trying to think a lot about, "Well, let's see now,
11 they've had to define Movies or they've defined
12 Syndicated" and I think you just would confuse them.
13 I think what -- you have very little to gain and you
14 have a lot to lose in terms of an accurate response.

15 CHAIRMAN AGUERO: Based, too, on your
16 testimony you said Advertising and -- Popularity --

17 THE WITNESS: Yes.

18 CHAIRMAN AGUERO: In these numbers what
19 you have is quoted with 73 percent, Movies 45 and
20 Serials with 30 percent, you took also advertising or
21 only popularity?

22 THE WITNESS: Well, we had one question
23 which deals with popularity with subscribers and
24 another question which deals with the use of certain
25 types of programming in advertising and promotion.

1 CHAIRMAN AGUERO: Yes. But the 73 percent
2 is advertising also or is only popularity?

3 THE WITNESS: What page are you referring
4 to?

5 CHAIRMAN AGUERO: Page 2. Advertising and
6 subscriber popularity.

7 THE WITNESS: Yes. The 73 percent is
8 popularity only.

9 CHAIRMAN AGUERO: Then advertising.

10 THE WITNESS: Now, there is another 73
11 percent on the page, which is I'm sure what you have
12 spotted and what --

13 CHAIRMAN AGUERO: Yes.

14 THE WITNESS: -- also 73 percent Movies
15 were used by 73 percent in marketing efforts. So,
16 they're both 73 but they happen to be different
17 numbers.

18 CHAIRMAN AGUERO: Thank you very much.

19 BY MR. GARRETT:

20 Q Mr. Bortz, it might be helpful at this
21 point, after you've given the questions, to kind of
22 walk the Tribunal through the survey and show what
23 questions were asked and then we get into the results.
24 But before I do, let me ask you, have you completed
25 your testimony now with respect how you attempted to

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1 respond to the CRT's concern?

2 A Yes. Yes, I have.

3 MR. GARRETT: And let me just state for
4 the record, Mr. Chairman, so there's nothing
5 misleading here, there are additional concerns that
6 the Tribunal had expressed with respect to the survey.
7 There were some that were advanced by MPAA's economist
8 and there were some that also dealt with conceptual
9 concerns. And we do have additional witnesses who
10 will be coming in to testify about those during the
11 course of our case. Mr. Bortz has simply presented
12 those concerns that you raised with respect to
13 methodology that he employed.

14 BY MR. GARRETT:

15 Q Mr. Bortz, you do have a copy of the
16 survey instrument itself attached to Sports Exhibit
17 1, do you not?

18 A Yes, let me refer you to page 32.

19 Q Let me ask you to also go to page 36 and
20 just explain the difference between the two
21 instruments that appear on 32 and 36 right now.

22 A All right. Let's start with that. As you
23 can see, we've got a questionnaire for 1989
24 respondents that starts on page 32. On page 36 we
25 have one 1990 respondents. We made very minor

1 changes. The only changes made were to make it clear
2 that 1990 respondents knew, remember we're in the
3 first ten weeks of the year, knew that we were talking
4 about 1989 and there would be no confusion. So, we
5 had in several of the questions had it in 1989 in
6 1989. So that they would not be confused as to what
7 year we were talking about. But the questions are the
8 same questions, other than the clarification that
9 we're referring to 1989.

10 Q All right. Why don't we just stick with
11 the '89 questionnaire that begins on page 32. Could
12 you just take us through it?

13 A Yes. Well, we start with just a group of
14 system identifiers. I think those are self-
15 explanatory.

16 Then we have instructions to the
17 interviewer to speak with the system manager or person
18 most familiar with programming. And if they can't
19 reach them, to call back. So, this is then in
20 question one is just to verify that once we've
21 identified an individual, that this is indeed the
22 person most familiar with programming carried by the
23 station.

24 Q And you provided us earlier, did you not,
25 with statistics on the number of -- the percentage of

1 general managers that were contacted?

2 A General managers, program directors or
3 marketing directors constituted 80 percent of our
4 responses.

5 Q Thank you.

6 A On page 83, question 2A.

7 Q I'm sorry, page 33?

8 A I'm older than I was the last time I was
9 here and I didn't have to wear these. I'll put it on.
10 Yeah, that looks like a 33. That's terrible.

11 Q Even with my glasses on, I can't --

12 A I tried to do it without, but I won't
13 pretend anymore.

14 2A is something that we built in from the
15 Statements of Account, that's the industry data that
16 we refer to. And we -- that's then read to the
17 respondent saying this is what we have that you call--
18 that you carry. And then we ask whether they've been
19 discontinued and if so, which stations? Have you
20 added any and if so, which stations?

21 And then to make sure that we've got it
22 right we say in 2D, "Just to confirm your lineup," and
23 we repeat then the modified list of stations so that
24 we all -- the respondent and the interviewer -- are
25 talking about the same compliment.

1 We then go in 2E to the first substantive
2 question, which is what types of programming do you
3 think are most popular? Now, don't get misled by this
4 list here, because we didn't read it. Okay? It was
5 made very clear do not read the list. And then they
6 listed. They would respond as to what was most
7 popular, the interviewer would enter that. And this
8 is the one where I said that we had 93 percent of the
9 responses. 93 percent of the total responses fit
10 right into these categories. If there was any doubt,
11 then they had to put it down on other.

12 Like one example was -- somebody said
13 Arsenal and the interviewer didn't reclassify it, they
14 wrote down "Arsenal," or they said reruns. The
15 interviewer didn't make the leap to say that was
16 Syndicated. They wrote down reruns. We, if we could
17 reclassify it, did that. And in our footnotes in the
18 report we detailed each of the instances where we
19 reclassified an other to a category.

20 So that's Popularity. That's the first
21 thing we started with, Popularity.

22 Question 3 --

23 MR. GARRETT: Whenever the Tribunal
24 wishes.

25 CHAIRMAN AGUERO: Take a five minute

1 break.

2 (Whereupon, at 11:24 a.m. a recess until
3 11:35 a.m.)

4 CHAIRMAN AGUERO: Let's go back to the
5 record. But before I think that the General Counsel,
6 Mr. Cassler, has one question for Mr. Bortz.

7 MR. CASSLER: Two questions.

8 CHAIRMAN AGUERO: Two questions?

9 MR. CASSLER: Two questions.

10 CHAIRMAN AGUERO: Okay.

11 MR. CASSLER: Mr. Bortz, I understand that
12 Mr. Garrett has said that there will be other
13 witnesses to talk about a criticism that the Tribunal
14 had concerning the question of the supply side of the
15 survey, but you were the author of the survey
16 instrument.

17 Could you answer whether the survey
18 respondents were saying they would spend 34 percent
19 of their budget on the existing two percent supply--
20 and I draw the two percent supply from the Nielsen
21 figures that say that two percent of the time on
22 distant signals consisted of Sports programming. Were
23 they willing to spend 34 percent on two percent of the
24 supply, on two percent Sports, of their day, or were
25 they talking about 34 percent in terms of they'd like

1 Sports to be ten percent of the schedule, or 15
2 percent of the schedule, or 20 percent of the
3 schedule?

4 THE WITNESS: The questionnaire was
5 designed to be very specific, and it was referring to
6 the compliment of signals that they carried in '89,
7 and the programming that was on that compliment. Now,
8 that will vary from system to system. But on average,
9 for the supply of programming that they had in '89,
10 they would devote 34 percent. So, it's specifically
11 to that supply, not -- not to an expanded supply.

12 MR. CASSLER: And the second question is,
13 you said that you excluded Canadian valuation where
14 it turned out that a system did not import a Canadian
15 station on the basis that they weren't going to spend
16 any money anyway, why ask them to go through that sort
17 of exercise.

18 My question has to do the with the
19 Devotional category. The record that the Tribunal has
20 so far developed, and it could be modified. But so
21 far, the record has been developed that broadcast
22 stations pay nothing for Devotional programming, or
23 sometimes they are paid to carry Devotional
24 programming.

25 So, if cable systems pay nothing for

1 Devotional programming, how much of it is a reflection
2 of the real market place that they would pay four
3 percent of their dollars on Devotional, when in
4 practice, they pay zero of their dollars on Devotional
5 programming?

6 THE WITNESS: Well, they -- they, of
7 course, aren't concerned with the arrangement between
8 the broadcaster and the religious broadcaster as to
9 how that signal got on to the station. When they are
10 looking at the value of various program types, in
11 attracting and retaining subscribers -- because that's
12 the business that cables in. You need to attract
13 people to your system to become subscribers. You need
14 to -- them on.

15 When you're delivering 50 channels, you
16 really don't care which ones they're watching and how
17 much they watch them. You don't look at viewing data.
18 You say, "in my marketing package, is it valuable for
19 me to have that to bring somebody on and keep them
20 on?" And what they're saying is, "well, it is." On
21 distant signal programming, whether some Devotional,
22 Religious programming on there, in our view, it is
23 worth four percent. I would be willing to, if I was
24 in a marketplace, to devote four percent of my budget
25 to have that -- for that, maybe, small percentage, but

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1 for that percentage of my subscribers to whom it would
2 appeal."

3 MR. CASSLER: Even though they're in the
4 current market place, that type of programming is
5 being offered free to everybody?

6 THE WITNESS: Well, it -- it is offered
7 to the broadcasters. Of course, on a distant signal,
8 the cable operator is paying for that programming.
9 They don't know what happens in the deliberations
10 here. They know that to carry these stations, they're
11 paying for it. And I suppose, in some cases, certain
12 -- for certain distant signals, they're carried
13 because, to a small degree, that programming is
14 attractive. And I think that they view that as
15 appealing to some -- to a slice of the business.

16 We're in a business in cable now, of
17 trying to bump penetration rates of percent, two
18 percent a year. And so, a slice -- although four
19 percent is small, it still means it's important.
20 Important enough that they would be willing to pay for
21 it at that level.

22 CHAIRMAN AGUERO: Mr. Garrett.

23 BY MR. GARRETT:

24 Q Mr. Bortz, let me go back to the original
25 question that Mr. Cassler had asked about whether or

1 not it is reasonable to assume from the survey that
2 cable operators would spend 34 percent of their
3 program budgets on programming that amounts to about
4 two percent of time.

5 Do you have that question in mind?

6 A Yes.

7 Q Just very briefly, and I know we'll get
8 into this later. How does that result compare with
9 your experience in the industry in valuing different
10 types of programming, and advising cable operators
11 concerning different values of programming?

12 A Well, I have to say that the result -- the
13 fact that it is not related to viewing fits quite --
14 quite closely to my impressions in the industry. I
15 have to say, quite frankly, that the only time I
16 encounter viewing hours as a measure is in the
17 proceedings of this Tribunal. That it does not occur
18 in the marketplace.

19 Let me give you some examples. We do a
20 lot of work when companies such as MultiMedia -- it's
21 a big syndicator -- was thinking of getting into the
22 cable program network business. And we do several of
23 these a year -- each year for different clients. And
24 we go out and talk to the top cable program
25 executives. And we'll do some at the system level,

1 and some at the corporate level, and say "here's the
2 idea and are you interested in it?"

3 Now, first of all, viewing level never
4 comes up because they know -- and if you take a look
5 at the data, you'll see -- that most distant signals,
6 most cable program networks, are going to average a
7 .3 rating, a .5 rating, maybe a blockbuster will get
8 up to a 1. The biggest ones do a little better than
9 that. But they know that the rating is going to be
10 small. Viewing hours doesn't enter into it.

11 So what they typically ask us about is,
12 they want to understand the concept to see how does
13 it fit in the marketing package? What segment is it
14 going to appeal to? What group of people might they
15 be able to go out and market to more effectively,
16 either to get more of them to subscribe, or to retain
17 those who are already on because they've got them?
18 The viewing hours doesn't enter into it.

19 And there are a number of other measures
20 that can be looked at. There is a cable marketplace.
21 In the cable marketplace, free marketplace, where
22 cable operators and cable program networks negotiate,
23 fight, over what the price will be for a basic cable
24 network, not a distant signal. And I think that we
25 can go into that in more detail later if necessary,

1 but I think that the results of that marketplace make
2 it very clear, number one, that viewing is not the
3 corollary, that they pay a lot of money to get
4 programming that they think is marketable.

5 They pay as much in a surcharge to ESPN
6 to get 24 hours of regular season NFL football, as
7 they pay to get 365 days a year, 24 hours a day, of,
8 say, USA Network, which has some Sports, but it also
9 has lots of Movies and Syndicated. They pay as much
10 to get NFL football for 24 hours as for 365 days a
11 year. So, viewing hours is not a factor -- quite
12 frankly, not a factor, in the cable marketplace.

13 COMMISSIONER ARGETSINGER: But they must
14 have some notion as to who watches ESPN and who
15 watches the other programs that you mentioned.

16 THE WITNESS: Right.

17 COMMISSIONER ARGETSINGER: Perhaps -- can
18 you -- they have to have some concern with viewership.

19 THE WITNESS: Yes.

20 COMMISSIONER ARGETSINGER: It's part of
21 marketing.

22 THE WITNESS: They do. And we do work
23 with them for United Cable, for example. We do work
24 with them. And what they use is not viewing hours,
25 because that's not -- as I say, it's not important to

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1 them.

2 What they do when they do a customer
3 satisfaction survey -- and this is common in the
4 industry -- is that they survey subscribers to find
5 out, "do you ever watch channel X?" whatever that is.
6 And then, "how frequently do you watch it?" Okay,
7 they're not using Nielsen data because it's
8 notoriously unreliable at the -- at the local
9 community level, at the market level for cable
10 networks, notoriously unreliable. They say, "do you
11 view it?" and then "on a four point scale, how
12 frequently do you view it? Do you view it frequently,
13 occasionally, seldom, or never?" And United Cable,
14 when they put that together, the only one that's
15 important to them is "frequently viewed." That's one
16 household that watches a channel repeatedly.

17 Now, when you get a rating, that tells you
18 how many households are watching at a -- in an average
19 quarterhour. But it doesn't follow one household
20 through a month, or a day, or a year. It just gives
21 you the rating at that point in time. Now, there are
22 channels that can get ratings and if everybody only
23 views it occasionally or seldom, it's ranked one heck
24 of a lot lower than a channel that gets the same
25 rating, but is viewed intensively by some percentage

1 of the population.

2 And why do they do that? Because it's the
3 intensity of interest, not the average rating, not the
4 viewing hours. It's the intensity of interest that
5 they can sell. They're asking you to spend \$30.00 a
6 month, this month, next month, and the next. And
7 they're much more excited about a channel that gets,
8 let's say, a half-a-percent of households who view it
9 a lot than a five percent of households who viewed it
rarely.

10 COMMISSIONER ARGETSINGER: So, you're
11 saying viewing is important, but it's a weighted
12 viewing?

13 THE WITNESS: It's -- it's a weighted
14 viewing and it's related to the intensity or frequency
15 of viewing, not to the absolute level of viewing. So
16 as I say, their whole approach is not to use ratings.
17 What they want to do is have a channel that somebody
18 wants. I want my MTV. You know, it's the teenager
19 that watches MTV frequently. That's saleable.

20 COMMISSIONER ARGETSINGER: Well, would a
21 cable system be likely to drop a channel that was
22 highly viewed, but perhaps didn't have this intensity?

23 THE WITNESS: The -- first of all, most
24 of them are down, all down in the noise. If you --
25

1 if you exclude the top ten cable channels, you're
2 talking about channels that don't deliver even a one
3 rating. It's a fraction of a rating point.

4 And so, the highly viewed channels --
5 sure, they'd keep USA, TNT, WGN, WTBS. Those are kept
6 because -- because there's some value to them. Not
7 kept on the basis proportionate to some viewing hours,
8 but guess what? They're viewed frequently by a lot,
9 if you take a look at the viewing of those channels.
10 There are a lot of people who show up frequently in
11 the surveys that we did, in fact, for United. And
12 actually, they were United surveys that we
13 incorporated into our work. ESPN, the sports channel,
14 came out first in terms of frequently viewed --
15 percent of frequently viewed.

16 COMMISSIONER ARGETSINGER: I suppose the
17 systems would go through this though, on distant
18 signals separately, because, of course, they pay a
19 different rate for the pay cable --

20 THE WITNESS: I would agree. I would
21 agree. I think that they -- that that's not a
22 marketplace. That's -- they know what the rate card
23 is.

24 COMMISSIONER ARGETSINGER: That's a
25 separate --

1 THE WITNESS: They're stuck with the rate
2 card. Even TCI can't get you guys to back down.

3 COMMISSIONER ARGETSINGER: So, if you're
4 carrying five distant signals and you want to cut your
5 expenses, I suppose you'd take a look at those five
6 to see which are viewed the most.

7 THE WITNESS: Well, I don't think you'd
8 look at the total viewing. Again, I think you would
9 look at the intensity, the frequently viewed measure.
10 And as I say, it's common.

11 Our -- one of my Vice-Presidents is the
12 former director of research at United Cable, and she's
13 on the Board of Directors of the Cable Marketing
14 Society, National Board. And she says that this is
15 typical. This is what you do. You look at intensity
16 of viewing, not the ratings. And frankly, they don't
17 have the data. At a system level, I mean, the
18 industry's kind of dirty little secret is that the
19 measurement of cable networks and distant signals at
20 the system level, is very uncertain. To be -- sort
21 of the seat of your pants feeling.

22 It's a system that was designed to measure
23 the viewing of local signals in the local market,
24 which typically, will get a high percentage -- 10, 11,
25 12 rating points a week. Independent might get three

1 or four rating points. And yet, you've got cable
2 networks and distant signals that might get three-
3 tenths of a rating point. The sample was not designed
4 to -- to accommodate that.

5 I could go into the detail, but let me say
6 that in my own work, on the advice of Nielsen, we --
7 they told us not to use their market-level data for
8 distant signal viewing. We went to them -- there for
9 special studies, so maybe they have some self
10 interest. But I believe it. They warned us away from
11 their data and into doing an augmented sample.

12 BY MR. GARRETT:

13 Q Very briefly, Mr. Bortz, following up on
14 that line of questioning, you talked here about
15 viewing and frequency and intensity of viewing. How
16 does that relate, specifically, to what cable
17 operators would be willing to spend, or would likely
18 spend, on particular programming?

19 A Well, I think intensity is an important
20 element. What we're trying to estimate here, in our
21 approach, is to provide you with some information that
22 is as close as possible, it simulates to some degree
23 a market place.

24 What is a cable market place? A cable
25 marketplace is -- in a -- in a free market place, not

1 the distant signal market place -- is a negotiation
2 between, as any market place, between a buyer and a
3 seller. And the buyer is the cable system and the
4 seller is the copyright holder. And admittedly, and
5 I go to Mr. Cassler's comments -- admittedly, we are
6 surveying the buyers and their -- what they are
7 willing to pay for a defined 1989 supply of
8 programming.

9 The seller only figures in there because
10 we've got the fixed supply. In a free marketplace,
11 there would be some more interactions. However,
12 that's the negotiation now. The buyer looks at
13 viewing as an element in deciding what he's willing
14 to pay. He looks at it in terms of its marketability,
15 its promotability, its popularity, its frequency of
16 viewing. And frankly, I have never encountered one
17 who looks at it in terms of total viewing hours.

18 But viewing, although it's legitimately
19 an element in valuation, it's a couple of steps
20 removed from the final decision-making process. It's
21 an element, an input to the cable buyer. Our survey
22 goes directly to the buyer, so I think we're much
23 closer to the marketplace than a viewing-based study
24 which is just a piece of data that the buyer
25 considers. At least we've jumped that hurdle and gone

1 right to the buyer and say, "hey, for this group of
2 programming, what's it worth to you?"

3 Q Before the break, Mr. Bortz, you had given
4 us -- well, you started to take us through the survey
5 itself. And I wonder if you could just complete that
6 process here? Exactly what it is that you were asking
7 the cable operators to respond to.

8 A Yes. Well, I had one question that was
9 asked of me early in that, in reviewing the survey
10 about the nature of the respondents and I'd like to
11 correct myself. I said 80 percent of the respondents
12 were general managers, program directors, and
13 marketing directors. The correct number is 89 percent
14 of the respondents were general managers, marketing
15 directors, and program directors.

16 Q All right. Thank you.

17 A Okay. We -- let's see, where had we left
18 off?

19 Q Well, we're on page 33 and we were up to
20 question --

21 A 2E --

22 Q -- 2E.

23 A -- where we had -- I was emphasizing that
24 this was an unaided question and was one of the
25 indicators that our categories made sense.

1 On Question 3A, we then get into another
2 element of value that the cable business is a
3 marketing business. It's a business of selling
4 subscriptions and keeping those people paying from
5 month-to-month. It's not the broadcast business.

6 We've worked with broadcasters and with
7 cable. A broadcast operator is real concerned about
8 ratings because he's only got one channel. And if you
9 don't get the ratings, that's it. A cable operator
10 has got 50 channels. People are going to distribute
11 themselves across those channels. They're not
12 concerned about the rating of any one channel.

13 So, one of the elements, popularity is
14 important. That goes into their decision making. A
15 second element that goes into their decision making
16 is, "is this something you can go out and really
17 promote and sell, use to sell?" And so, that's what
18 3A is, is what programming that you have do you -- and
19 distant signals, do you feature in advertising and
20 promotional efforts? Or first of all, 3A is just do
21 you? If no, then we -- if they don't do that, we go
22 ahead.

23 3B then says, "what types of programming
24 do you feature?" and note, this is again unaided.
25 We're not reading a list and I can -- I think my

1 recollection is that Sports got a 75 percent response,
2 unaided, not to our category, but just off the top of
3 the head.

4 COMMISSIONER DAUB: Mr. Bortz, this is
5 overall station advertisement, not a preview for
6 program preview, announcing upcoming program?

7 THE WITNESS: Well, this would be what
8 they -- what the system itself uses in attracting and
9 retaining subscribers. So, it wouldn't be, say, ESPN
10 buying a spot on some other network lifetime, to
11 promote itself. It's not that. It's the system
12 itself. Might use it in a newspaper ad. Might put
13 it into mailers. Might put it into promotional
14 material that their door-to-door salespeople use.
15 Might, indeed, use it to promote the value of your
16 cable package on the system on one of the channels.

17 So, it could include a video that says,
18 "look at all you get for, you know, \$30.00 a month"
19 and sort of understated "don't complain about the
20 price because look at all you get." I mean, that's -
21 - so they will use that on their -- on their channels
22 as well. But it's the system itself using it.

23 COMMISSIONER DAUB: Not a program promo?

24 THE WITNESS: Not -- not the program
25 network promoting its own programming. It's the

1 system promoting the programming it carries, and there
2 is a difference.

3 COMMISSIONER DAUB: Because it does make
4 a great deal of difference when it comes to
5 availability. Because you do have a heck of a lot
6 more movies in series --

7 THE WITNESS: Sure.

8 COMMISSIONER DAUB: -- if you're
9 announcing --

10 THE WITNESS: Sure, say "it's coming
11 up"-- COMMISSIONER DAUB: "it's coming up" --

12 THE WITNESS: Right.

13 COMMISSIONER DAUB: -- and tune in
14 whatever. So Sports not having as many -- okay, thank
15 you.

16 THE WITNESS: So, here, this is different
17 than question two in that we started with unaided,
18 and then they mention some categories. And then, as
19 you see in -- in 3C, we aid them. We say -- just in
20 case, we're sort of saying, "okay. But do you also
21 feature," for example, movies which didn't get
22 mentioned that much. Unaided got mentioned a lot when
23 you added the aided feature to it. So, we went
24 through the list and -- and hit the unaided.

25 Then combining the two, the unaided

1 response and the aided response, then we wanted to
2 find out "what's most important -- of these categories
3 that you use, what's the most important? Second most
4 important? Least important?" just to get a scale.
5 And that -- that was the major instruction for
6 question three.

7 Question four is the question that is
8 represented in the chart here. And this is the
9 relative value question that we worked on very
10 carefully, to respond to the concerns expressed in
11 '83. Now, you can see in this second paragraph,
12 "assume you have a fixed dollar amount to spend on
13 non-network programming carried on these stations."
14 In other words, a programming budget, very specific.
15 This is your programming budget for non-network
16 programming on these stations. Not on all the
17 stations out there that you might get, but on these
18 that you carry.

19 And then, you can see that we random --
20 have a thing there that indicates "random sequencing."
21 The concern being that since this is all aided -- we
22 go through the list -- we didn't want to give an
23 advantage or disadvantage to any particular category
24 in being listed first, or in the middle, or last. And
25 so, that was rotated through the questions.

1 And that -- at the bottom, let me just
2 also note this is a note to the interviewer. "Must
3 add to 100 percent. Prompt the respondent if they
4 don't." And so, there were cases where it didn't,
5 getting to a question that was raised earlier,
6 questions -- where it didn't add to 100 percent and
7 they went back through it and had to reallocate. And
8 that's not bad, that's good. We want them to
9 reallocate because we want them to make decisions.
10 They have to make decisions between these different
11 categories.

12 That completes the questionnaire. As I
13 indicated to you then, it's just followed by the '90
14 form.

15 BY MR. GARRETT:

16 Q All right. Let me ask you to turn to the
17 results that you reached in connection with this
18 survey. And maybe starting out with question two, and
19 working your way back to question four. Just tell us
20 what this survey showed.

21 A All right. -- question two, the survey
22 results would be on page 15, and we have a chart to
23 illustrate that. Remember, we went through a sequence
24 there. "Do you use any programming?"

25 Excuse me. This is two which is the

1 popularity of the types of programming on. "What's
2 most popular with your subscribers?" You can see,
3 this doesn't add to 100 percent because they could
4 give us two categories, or three categories. If they
5 wanted to say, "well, Movies and Sports are most
6 popular." That's all right. We didn't constrain it
7 to only the most popular.

8 It's also unaided. No categories were
9 mentioned to them. And what you see here is that live
10 Professional College Sports is most important by a
11 wide margin, 73 percent. A wider margin, certainly,
12 than we have on the budget allocation. So, although
13 it's the most popular, there are different factors
14 that come into their minds when they make a budget
15 allocation.

16 Movies, also quite popular in Syndicated,
17 and you can see the other categories there, or on page
18 15. You can see it adds to 162 percent which is
19 because of the multiple responses. And that was the
20 result of -- of question two, and it is quite
21 consistent with, certainly, my experience in the
22 industry in working with the cable operators, that you
23 would see this kind of a distribution.

24 We then went to the next step which is
25 question three, which goes to the use of this in

1 programming. And if you turn to page 19, you'll have
2 some detail which breaks out the responses by the
3 unaided and the aided category, and then, the combined
4 category, first of all. And you'll see -- this is not
5 on the chart yet. If you just look at the table on
6 the top of page 19, you'll see that the live
7 Professional College Sports was mentioned as being
8 used 74 percent of the time, unaided, Movies at 34
9 percent.

10 What this chart presents is the later
11 question that gets to the relative importance. And
12 what we've featured here is the most important -- most
13 important. So we said, "okay, you're using these
14 three categories, aided and unaided. Which is most
15 important?" And you can see, 64 percent essentially
16 for live Professional College Sports, 15 percent for
17 Movies, and the Others, very small. It is quite
18 consistent with what you would find -- for example,
19 we submitted, if I can introduce in -- is it
20 Attachment or Exhibit 2? Am I right as to what that
21 might be? The ads -- let me just --

22 Q Maybe it's Exhibit number 4?

23 A Exhibit 4?

24 Q Yes. Do you have a copy of Exhibit 4
25 before you?

1 A What we did here was to take a census of
2 the ads that were in three key trade publications,
3 Multichannel News, Cable Vision, Cable Marketing.
4 These are really targeted to cable operators. They're
5 broadcasting, which I'm sure you're acquainted with,
6 electronic world, that sort of electronic media are
7 more broadly cast.

8 So we looked at something that was really
9 pitched to the cable operator who took the census.
10 And if you thumb through that, what you see is that
11 overwhelmingly -- a superstation. That this is
12 promoted very heavily by the superstation to the cable
13 operators. And the reason that it's promoted by the
14 superstation to the cable operators is that the cable
15 operators know that it's important for them, because
16 they can market it and turn to their subscribers.

17 So, the microwave carriers or the common
18 carriers are responding to what we measure here, and
19 they know their market. So, the cable operators tell
20 us Sports is important. It's pretty obvious that the
21 superstation operators also know that the cable
22 operators think Sports is important, or they wouldn't
23 have ads so heavily keyed to Sports as they do here.

24 CHAIRMAN AGUERO: In this exhibit, in the
25 Exhibit number 4, on WWOR TV, New York, they said that

1 we have already two games in 1989 on the New York
2 Mets. And then, you may have 75 or more in 1990-'91.
3 But the -- the advertising in this ad doesn't specify
4 how many New York Mets games are in 1989, and also how
5 many games the Rangers have. Do you know how many
6 games the Rangers --

7 THE WITNESS: I'd have to look that up.
8 I don't -- I don't recall. I'll --

9 CHAIRMAN AGUERO: The same thing happened
10 with the WGN. They have the Chicago Bulls, but they
11 don't specify how many games in 1989. They don't
12 specify how many games Chicago White Sox in 1989, and
13 they specify Chicago Cubs 150 games in 1989. There's
14 no specification on the other --

15 THE WITNESS: Well, if you're referring
16 to -- to the trade ads that they have --

17 CHAIRMAN AGUERO: Yes.

18 THE WITNESS: The key thing is, what's on.
19 And the actual number of games in a trade ad, I don't
20 think you would convey that. The sales forces can
21 convey that, but the trade ad itself, doesn't
22 necessarily have to go to that level --

23 CHAIRMAN AGUERO: Very good. Anyway, it
24 was very encouraging to see how many games on the
25 Bulls and how many games on the White Sox was

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1 performed in 1989. Maybe in the future, you --
2 somebody would give me the information. Also, how
3 many games on WWOR TV on the New York Mets --

4 THE WITNESS: Well, we could certainly
5 provide you the specifics as to what the carriage was
6 in 1989.

7 CHAIRMAN AGUERO: Thank you very much.

8 BY MR. GARRETT:

9 Q Mr. Bortz, do you feel that the number of
10 games, exact number of games, would be important to
11 cable operators, deciding whether or not to carry a
12 superstation?

13 A No. Certainly, if you're talking about
14 big -- five games versus thirty makes a difference.
15 Whether it's 20 games or 25 games, I think, isn't
16 going to make much of a difference in terms of the
17 attractiveness to cable operators.

18 And again, that goes to the fact that they
19 don't add up viewing hours. What they want to be able
20 to do is promote "we've got the Chicago Bulls." And
21 they can promote that just as effectively with 20
22 games as with 25.

23 CHAIRMAN AGUERO: It doesn't make any
24 difference to a cable operator if you have two games
25 with Chicago Bulls or 20 games with Chicago Bulls?

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1 THE WITNESS: Oh, yes. Two and 20 makes
2 a difference. What I'm saying is --

3 CHAIRMAN AGUERO: Five and 20?

4 THE WITNESS: I still -- that's still a
5 big difference.

6 CHAIRMAN AGUERO: Ten and 20?

7 THE WITNESS: At ten, I'd begin to think
8 you've got something you can go market.

9 CHAIRMAN AGUERO: Okay.

10 THE WITNESS: Okay. That's a judgment,
11 but at ten, I think a cable operator could credibly
12 begin to think about marketing it.

13 BY MR. GARRETT:

14 Q Mr. Bortz, I think you'd already given us,
15 earlier, the responses -- or the result with respect
16 to question four.

17 Let me just ask you whether or not you
18 feel that those particular allocations are
19 representative of the allocations that all cable
20 operators would have given through their different
21 program categories in 1989?

22 A Okay, first of all, you'd recall, we
23 talked about the way the sample was selected, the way
24 it was stratified. And we believe that these numbers,
25 as represented here, are projectable to the universe

1 consistent with the royalties paid in. Now, that's
2 what we controlled the sample for. That was the
3 primary focus.

4 The question that comes up is, it's not
5 perfect. Where is it not projectable? And there are
6 some areas where it's not. For example, there's
7 nothing in here that reflects the views of Form 1 and
8 Form 2 cable systems. So, this doesn't -- this is not
9 projectable to what Form 1 and Form 2 would say.
10 That's a limitation on it.

11 For PBS and Canadian systems -- stations,
12 a distant signal PBS and Canadian, there was only --
13 there's only a small percentage of the systems that
14 carry it. I think 21 percent of the 89-2 Universe
15 carries a distant signal PBS. So, when we did our
16 sample, although it's large -- it's 10 percent of the
17 all the Form 3 systems, 27 percent of the royalties--
18 there is a subgroup in there of Public Broadcasting
19 Stations that you could miss. Because when you get
20 down -- that's like trying to measure viewing of
21 distant signal stations or cable networks, using the
22 Nielsen local ratings. Huge errors around it.

23 Well, we're likely to have an error in our
24 sample of a small population of PBS stations. And in
25 fact, what we found was 14 percent of the systems,

1 14.4 percent of the systems in our sample, carried a
2 distant PBS signal; 21 percent in the Universe. So,
3 we under represented them. Now, in '83, we didn't.
4 But statistically, there's that chance because we're
5 looking for small carriage, low levels of carriage.

6 What does that mean? Well, it means that
7 because PBS is under represented in our sample, that
8 1.3 is probably not -- not a proper allocation for it.
9 What should it be? My reaction would be that, "okay,
10 we've only got about two-thirds of their
11 representation in the sample." We assume that those
12 that should have been included up to the 21 percent,
13 have about the same view of it as the two-thirds do.
14 Then the 1.3 would be able 1.9. And in fact, if you
15 looked in our Appendix, you can see that the
16 uncertainty around the PBS number is fairly large, and
17 it reflects the small sample.

18 COMMISSIONER ARGETSINGER: If you say the
19 other third would have the same view as the two-
20 thirds, how do you -- what you're saying is --

21 THE WITNESS: Proportionately, if we would
22 then say, "okay, we've only got two-thirds of your
23 group. We're going to give them more weight to bring
24 you up to an equivalent weight of -- if we had gotten
25 the right bunch, 21 percent."

1 COMMISSIONER ARGETSINGER: Just as an
2 error factor --

3 THE WITNESS: As an error factor.

4 COMMISSIONER ARGETSINGER: -- but you did
5 say that you figured the other remaining one-third
6 would view it about the same.

7 THE WITNESS: If we make that assumption.

8 COMMISSIONER ARGETSINGER: If you make
9 that assumption, it would still come out 1.3?

10 THE WITNESS: No. The 1.3 comes up to 1.9
11 because they're represented more in the sample. It
12 would be like adding new responses that said, "yes,
13 I like Public Broadcasting."

14 COMMISSIONER ARGETSINGER: Oh, I see.
15 So --

16 THE WITNESS: So, it would increase the
17 1.3 to a 1.9.

18 So, because we under sampled PBS, we
19 understate it. Now, we did not recheck the sample
20 with respect to Canadian and although that's a small
21 group, they were not under sampled. That was within
22 the -- the range that we can accept. But the PBS
23 number of 1.3, I think, has certainly connected to it,
24 and I would extrapolate it to about a 1.9. So, that's
25 a factor that I think, in terms of projectability,

1 that he would need to question.

2 With respect to other factors, the sample
3 that we drew was checked in terms of does our sample
4 -- does it represent the Universe in terms of carriage
5 of superstations, number of superstation signals
6 carried? The answer was yes, it is projectable to
7 that. What about their carriage of other independent
8 stations, non-superstation? The answer is yes, it is
9 projectable in terms of that. What about distant
10 network affiliates? Also, yes. So, really, with the
11 exception of Form 1 and 2, and with the exception of
12 PBS, I believe it is projectable to the Universe.

13 BY MR. GARRETT:

14 Q We also made clear, Mr. Bortz, that your
15 data was based on 88-2 Statement of Accounts, correct?

16 A That's correct.

17 Q And it's also correct that there were some
18 systems that would have filed an '89 at some point
19 that did not file an 88-2 as a Form 3, correct?

20 A That's also correct.

21 Q What are you saying with respect to those
22 systems?

23 A Well, that also was looked at, and the
24 systems that filed in 1989-2, that were not included
25 in the 88-2 Universe account for about two percent of

1 the royalties paid in. So, in order to meet the
2 Tribunal's concerns of a timely survey, yes, there's
3 two percent of the revenues, systems representing two
4 percent of the revenues who arguably should have been
5 in our Universe, not necessarily ending up in our
6 sample, and who were not in the Universe. So, that's
7 -- that's a two percent kind of problem.

8 Q Mr. Bortz, I don't have any further
9 questions. Is there anything that you would like to
10 add?

11 A Well, I -- let me say that my -- of this
12 is not limited to the results of the survey alone.
13 I have, for 20 years, spent a lot of my time in the
14 business, with two years on your side of the fence,
15 representing the Government. But also very much
16 involved, at that point, in broadcast and cable
17 policy. And I find that this is quite consistent with
18 -- with other studies we've done and experience we
19 have.

20 I think it is consistent with the many
21 hours, days, weeks, that I've spent in negotiating
22 Sports' rights contracts, with cable networks, with
23 broadcast stations. We represent, always, the Sports
24 side in the negotiation, but we know the value that
25 they put on it. We were very much involved in pricing

1 out the new NBA National Broadcast Contract on behalf
2 of the NBA. We negotiated with Regional Sports
3 Networks, as I say, with individual broadcast
4 stations.

5 What this survey reinforces, but which I
6 think is generally known in the cable industry, is
7 that Sports attract and retain subscribers to a high
8 degree. Our cable network feasibility studies have
9 shown this, and I think that there's nothing different
10 here. Why Sports is unique? It's a perishable
11 product. You know, Michael Jordan isn't going to be
12 here ten years from now, I don't think, playing for
13 the -- Jerry Rise sort of hopes that he will, but I
14 don't think that he will. And you can't rerun Michael
15 Jordan. People want it and they want it now, when
16 he's at the height of his power.

17 The ads that I mentioned for superstations
18 support this further. Our Sports on television work
19 that we did, I think, also support. That leaves me
20 with a question of the disparity between the sort of
21 four to one ratio that Movies and Syndicated
22 Programming gets to Sports, and what we have here.
23 And I can't ignore that. And I know that you have
24 deliberated on it. I'd have to say that there's
25 nothing in the marketplace that will allow me to say

1 that there is anything like that kind of disparity
2 that exists. It just doesn't in the marketplace.

3 The hours viewed, as we've talked about
4 earlier this morning, is a factor, but it's a factor
5 that's subsumed within attracting and retaining
6 subscribers. If you don't get monthly revenue, you're
7 not in the cable business. The 50 channels, it's not
8 ratings; it's attracting and retaining. I indicated
9 the nature of the marketplace and I think, in my
10 opinion, that relative amount that copyright owners
11 would -- would be willing to pay in direct
12 negotiations. I'm sure it's not this number. This
13 is not it. I -- you know, there are elements that
14 this survey doesn't address. But I think it more
15 closely reflects this kind of distribution, than the
16 kind of distribution that exists right now.

17 MR. GARRETT: Thank you, Mr. Bortz.

18 CHAIRMAN AGUERO: Any questions?

19 COMMISSIONER DAUB: Mr. Chairman, I have
20 one question.

21 Mr. Bortz, I can appreciate, in this
22 hypothetical situation, when you asked the cable
23 operators with respect to budget and promos. But as
24 far as the subscriber preference to the program goes,
25 that's hypothetical, is it not? Do you have any data

1 or -- for those respondents to back up their --
2 essentially, is it not a guess on their part?

3 THE WITNESS: Yes. As I indicated, they
4 do customer satisfaction surveys.

5 COMMISSIONER DAUB: Oh, they do do that,
6 okay.

7 THE WITNESS: They do that, and their
8 survey -- their customer satisfaction survey is not
9 Nielsen announced. They're in touch with a customer
10 who is paying them a monthly fee. They don't use
11 books. The broadcasters might use rating books.
12 That's what those were developed for.

13 The cable operator wants to know customer
14 satisfaction, and the way they typically address
15 satisfaction is frequency of viewing, intensity of
16 interest, not viewing hours.

17 CHAIRMAN AGUERO: Commissioner
18 Argetsinger?

19 COMMISSIONER ARGETSINGER: On page four,
20 your last paragraph there, is that what you were
21 referring to when they say -- where you're saying
22 "however, they also rely heavily upon surveys"?

23 THE WITNESS: Yes. And that's -- that's
24 exactly what I'm referring to, and they are surveys
25 of consumer preference, not levels of viewing.

1 COMMISSIONER ARGETSINGER: You haven't
2 introduced any of those surveys?

3 THE WITNESS: No, we have not.

4 CHAIRMAN AGUERO: In your Exhibit number
5 8, in reference to the over-the-air examination by the
6 Tribunal, can you tell me, Mr. Bortz, in which
7 criteria the CRT may weight the rating over there?
8 Can you give me some -- brief me on what you're trying
9 to speculate here?

10 THE WITNESS: Okay. Let's see. Is there
11 a page number that you're referring to?

12 CHAIRMAN AGUERO: No, but it's on --

13 THE WITNESS: There are Roman Numerals at
14 the top of the page.

15 CHAIRMAN AGUERO: The summary then,
16 "Typical, local, over-the-air ratings for selected
17 professional Sports are:"

18 THE WITNESS: Okay, yes.

19 CHAIRMAN AGUERO: Can you brief me on this
20 issue, please?

21 THE WITNESS: Okay. This -- we took the
22 local over-the-air ratings books to -- this report was
23 prepared for broadcasters -- to give them a feel for
24 the draw of the different types of Sports. As you can
25 see, Major League Baseball, local teams -- this is

1 local teams in the local market out draws the NBA.
2 And the NBA is proportionately higher than the
3 National Hockey League.

4 That's the purpose here because this
5 report was addressed to broadcasters. Broadcasters
6 pay a lot of attention to ratings because they've only
7 got -- remember, they've got one channel. And the
8 broadcaster wants to know "if I put on baseball, how
9 much is that rating?"

10 A cable guy has got 50 channels. He says,
11 "how do I give enough variety to draw people?" How?
12 Some might watch -- they know, for example -- there's
13 been research done that shows that any individual
14 cable subscriber typically watches six or seven
15 channels only, out of the 50. But the six or seven
16 that you watch is going to be different than the six
17 or seven that you watch.

18 And so, what they want, is a collection
19 of channels that allows them to increase the
20 percentage of households that take the service.
21 They're not looking, like a broadcaster, for a big
22 rating on a single channel, because they decided long
23 ago -- the industry at one point said, "why don't we
24 all get together and let's put together a cable
25 channel that's going to rate as highly as ABC or CBS

1 or NBC." It was called the Cable Superchannel and it
2 was proposed by Tryg Myhren, who at that time, was the
3 Chief Executive, ATC.

4 Well, they backed away from it very
5 quickly. They said, "that's not the business we're
6 in. We don't want one channel that gets big ratings.
7 We want a lot of channels that appeal to little
8 minority interest groups so we have the C-span. We
9 have an Arts and Entertainment. We have a nostalgia
10 channel, in addition to some of the bigger ones."
11 It's a very different business. This was directed
12 to broadcasters. Broadcasters use ratings.

13 CHAIRMAN AGUERO: On your next page, you
14 have "Production costs for Baseball and Basketball,
15 Professional and Major College typically range from
16 \$15,000 to \$20,000 per telecast over-the-air and then
17 sells them for \$50,000 for telecast on cable." Can
18 you give me some explanation on --

19 THE WITNESS: Yes.

20 CHAIRMAN AGUERO: -- on that \$50,000 on
21 \$20,000. In what category, is for the time in
22 television, for time in cable, for production costs
23 or how? How do you --

24 THE WITNESS: Okay. This is production
25 cost. It's not the time.

1 CHAIRMAN AGUERO: You mean for the
2 cameras? For the cameras --

3 THE WITNESS: The cameras, the producers,
4 the directors. Let me say that --

5 CHAIRMAN AGUERO: All at \$50,000?

6 THE WITNESS: Well, this is local. My
7 good friends at ABC --

8 CHAIRMAN AGUERO: Well, let me count --
9 if they're using this --

10 THE WITNESS: It's a lot fewer than what
11 the networks -- CBS' production cost, I don't recall
12 the number, but it would be several times this.

13 CHAIRMAN AGUERO: Oh, yes.

14 THE WITNESS: This is for local
15 production.

16 CHAIRMAN AGUERO: Local production.

17 THE WITNESS: And then cable -- the cable
18 sports networks typically do a somewhat less full
19 production than the local broadcast station, and
20 that's why it's a lower -- lower range. And that --
21 these were the numbers that applied at the time this
22 report was -- was written which was 1990 -- '89, '90.

23 CHAIRMAN AGUERO: Okay, thank you very
24 much. This -- for me.

25 Is any Commissioner have a question?

1 Commissioner have a question?

2 Well, Mr. Bortz, thank you very much and
3 we're going to take a one hour and 15 minute recess.
4 We shall return around a quarter-to-two.

5 (Whereupon, the hearing was recessed at
6 12:23 p.m., to reconvene at 1:45 p.m. this same day.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:53 p.m.

CHAIRMAN AGUERO: Mr. Garrett, I left one question in his examination with Mr. Bortz and he would like to have how many seconds, Mr. --

MR. GARRETT: Probably be in 45 seconds.

CHAIRMAN AGUERO: 45 seconds. Okay.

BY MR. GARRETT:

Q All right, Mr. Bortz, let me just ask you to turn Sports Exhibit 7 and identify that for the record please.

A Sports Exhibit 7 is -- consists of advertising materials that the resale carriers of superstations provide to cable systems to use in their advertising. And, again, I think you can see in terms of these ad slicks that professional sports is just very strongly featured here for a number of different stations.

CHAIRMAN AGUERO: Okay. Then let's go back to Exhibit Number 7, Mr. Bortz. Of the activity number four in Exhibit 7 mentions the Chicago Cubs, the Chicago Bulls and Chicago White Sox on WGN and also you have the Exhibit 7, the WSBK. They advertise the Boston Red Sox, no? And then they advertise also on WOR-TV, the Amazing Mets and something else.

1 WSBK in Boston -- but they don't mention
2 how many games within the system. They never mention
3 the amount of games of Boston Red Sox on WSBK, on WOR-
4 TV and on WGN. Basketball, baseball, football,
5 whichever they have.

6 THE WITNESS: Yes. I think it illustrates
7 a point that I attempted to make this morning. And
8 that is that it's the intensity of interest and the
9 marketability of programming that's crucial.

10 When I negotiate a sports contract on
11 behalf, say, of a franchise, we know that the first
12 five or ten games are the most valuable. And
13 sometimes I'll get an owner who will say "well, I need
14 to increase my cable revenue and we've got 20 games
15 right now on a regional sports network. So, let's put
16 40 games on the regional sports network and go out and
17 get me twice the rights fee."

18 It doesn't work that way because each
19 additional game as you increase the amount of that out
20 there it's not worth as much proportionately. We're
21 talking about intensity of viewing. Giving somebody--
22 giving a cable operator something they can sell to
23 bring on the subscriber.

24 And if they've got the Mets or they've got
25 the Bulls and they market it and advertise it, not

1 unlike this, they're not going to sell it on that
2 we've got great big numbers of games. It's the fact
3 that they've got it that makes it marketable.

4 This is -- this is very different then the
5 broadcast business. They want something that's
6 marketable. It's focused on intensity. It's not
7 focused on sheer hours and that's why you don't see
8 these mentioned here. That's not the key. That's not
9 the key to marketing cable.

10 CHAIRMAN AGUERO: Thank you for your
11 answer.

12 Mr. Lane?

13 CROSS EXAMINATION

14 BY MR. LANE:

15 Q Mr. Bortz, in the 1983 study you had five
16 strata in the sample, did you not?

17 A That's correct.

18 Q And in the 1984 study -- I'm sorry -- the
19 1989 study, if you turn to page 4 there are four
20 strata, correct?

21 A Four strata is correct.

22 Q Now, in 1983 there were, according to your
23 testimony, 1,570 cable systems. Will you accept that?

24 A I'll accept it.

25 Q And how many do you show for 1989?

1 A 1,977.

2 Q Why when you had 400 more cable systems
3 in 1989 did you reduce the number of strata from five
4 to four?

5 A Well, the complete answer would have to
6 come from Doctor Bardwell, though. All we provided
7 to Doctor Bardwell was the universe of the 1,977
8 systems. He looked at the mix of royalties that were
9 paid and applying his statistical techniques he
10 ascertained that four strata would be adequate for us
11 to use.

12 That's based upon statistical analysis.
13 I'm not qualified to go into the details of that.

14 Q Do you know what this effect of reducing
15 it from five to four strata had on the results?

16 A I think that the best way to look at that
17 would be to look at the confidence intervals that were
18 applied to -- to the results, which are provided in
19 the appendix of our report and on question four, page
20 28.

21 See, these are very narrow confidence
22 intervals. I don't recall the precise numbers, but
23 I think they're quite comparable to what we had. I'd
24 have to refer to the '83 report to check the
25 confidence intervals. But, this level of confidence

1 interval is certainly quite adequate.

2 Q Now, in the 1989 study the top two strata,
3 that is the 110 and above account for about 58 percent
4 of the royalties, do they not, based on the figures
5 you've shown on page 24?

6 A No. I think that comes out to about 47
7 percent, if I did it correctly.

8 Q I'm sorry. Do you know what the
9 comparable figure was for the 1983 study for the top
10 two strata?

11 A No, I have not reviewed that.

12 Q You didn't think that was important to see
13 -- this is, is it not, the percent of total royalties,
14 how you weighted the answers for the weighted results?

15 A The sample frame was established by Doctor
16 Bardwell. It is described in detail in our appendix
17 and he specified to us the sample frame. We simply
18 executed it.

19 Q Well, would you answer my question? Is
20 this not how you weighted the final results with this
21 percent of total royalties for each strata?

22 A Percent of total royalties is in the
23 weighting for each strata, that's correct.

24 Q Now, you indicate on page 23 that the
25 first -- that is the highest stratum was selected

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1 first, is that correct? That's at the bottom of the
2 page. Do you see that, the first sentence of the last
3 paragraph?

4 A Well, it's a statement that because of the
5 small number of systems, 35, that fell in that -- in
6 that range that all had to be included and so that was
7 specified. I don't know that there's any preferential
8 design.

9 It's simply in looking and applying his
10 statistical rules, he was able to determine that with
11 the frequency distribution of royalty payments that
12 existed in the universe that the first -- that the
13 large strata should, in fact, embody the 35 systems
14 that it did embody.

15 Q And as I read the next sentence, that
16 statistical rule of the "cum square root of f rule"
17 only applied to the three other strata, is that -- am
18 I reading that sentence correctly?

19 A That's -- that -- that is correct. That's
20 the way those boundaries were set after he -- after
21 he determined that the large systems should
22 essentially be a census of systems as opposed to a
23 sampling.

24 Q So, who was the person who determined that
25 300,000 would be the floor or that top strata?

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1 A Doctor Bardwell.

2 Q And you don't know how he did that?

3 A No, I don't.

4 Q And you don't know whether -- or do you
5 know whether or not he decided that he needed 35
6 systems and just cut it off when he got 35 systems or
7 he picked 300,000 and whatever fell in there fell in
8 there?

9 A I'm sure it was nothing as simplistic as
10 that. He -- he used whatever statistical guidelines
11 he thought were appropriate.

12 Q Now, you used the same approach, did you
13 not, in the '83 study? That is, you picked the
14 largest stratum first and then the other three strata
15 -- or the other four strata in the '83 study fell
16 based on that f rule or whatever it's called?

17 A Well, I have not reviewed the '83 study
18 and given that the statistical selection was done by
19 Doctor Bardwell, I -- I'd be unwilling to rely on my
20 recollection.

21 Q Okay. So, you don't know how it was done
22 in that --

23 A It was, I believe, specified in the
24 report.

25 Q Now, do you know whether many of the same

1 systems that appeared in the top stratum in the '83
2 study were also the same systems that appear in the
3 top stratum of the '89 study?

4 A We did no comparison of that. These were
5 independently drawn samples.

6 Q And you didn't look at that, did you?

7 A No.

8 Q Do you think it's likely that the same
9 largest systems will continue year after year or will
10 there be significant changes in the largest systems
11 in the country?

12 A I wouldn't want to speculate in a general
13 way. Obviously 1983 was still during a period of
14 cable system build-out. Systems that were large in
15 '89 might have only been under construction or not
16 even under construction in '83. So, I wouldn't want
17 to speculate on that mix.

18 Q Did you take any look to see how many
19 systems in your '83 study in total were also in your
20 '89 study?

21 A No, we did no such comparisons.

22 Q When you chose the top stratum you must
23 have known the identities of the systems, did you not?

24 A No. Doctor Bardwell operated from
25 essentially just a listing of the royalties that were

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1 paid and did not have the geographic location of the
2 system.

3 Q But, somebody prepared that list for him,
4 did they not?

5 A Yes, that's correct.

6 Q And they got that information, did they
7 not, from the Statements of Account?

8 A I believe in the sample selection it was
9 the remittance records that were used rather than the
10 Statements of Account.

11 Q The remittance records from Cable Data
12 Corporation?

13 A Remittance records at the Copyright
14 Office, I believe.

15 Q And the remittance records identify the
16 name of the cable system and the location, do they
17 not?

18 A I believe that they do, yes.

19 Q So that somebody at Bortz and Company at
20 the time knew the identity of all the cable systems
21 in the top stratum?

22 A That would be correct.

23 Q But, did you put together the list for Mr.
24 Bardwell?

25 A No, I did not.

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Q Do you know who did?

A It would have been one of the individuals on my staff. I don't recall who that would have been.

Q Now, was there any judgment involved in deciding what the levels of all three lower strata were in the '89 study?

A I believe the boundaries were established the way Doctor Bardwell has specified to us, applying this rule of frequency distributions and there was no subjectivity involved in that.

Q The sample that Doctor Bardwell chose was 244 systems, correct?

A Yes.

Q And that's what you testified this morning. The smallest was one in 20 of the systems and so on and so forth, correct?

A That's -- well, to clarify that from the lowest royalty stratum, one out of 20 were selected and as described this morning, the other samplings--

Q Now, what was the determination that one in 20 and so forth was the right proportion of each one of the stratums?

A That was Doctor Bardwell's specification to us.

Q And you don't know how that was --

1 A No. He was, as we've indicated, fully
2 responsible for the statistical design of the
3 sampling.

4 Q And have you provided any information in
5 your testimony which states how that decision was
6 made?

7 A It's embodied in things that I am afraid
8 cannot be explained to you, such as Neymann's
9 Allocation Formula.

10 Q So, is that a different formula from the
11 f rule formula?

12 A I'd have to -- I'd have to refer you to
13 the Statistical Appendix where we set it out for
14 certainly statistical experts to review and comment
15 on. I am not myself a statistician.

16 Q When you first had the 244 systems the
17 first thing you did was look through the remittance
18 information to determine what kind of systems they
19 were, is that correct?

20 A No. Once the 244 systems were drawn we
21 obtained the Statements of Account from the Copyright
22 Office for those 244 systems. And it was at that time
23 that we discovered certain systems for which, as I
24 indicated this morning, there was either no signal
25 data provided or in two cases they weren't cable

1 systems.

2 Q And that's shown on page 30, note two of
3 your testimony?

4 A That's correct.

5 Q So, now you're down to 237 systems,
6 correct?

7 A That's correct.

8 Q You did not make any effort to choose
9 another seven systems to replace the ones that were
10 lost as a result of your initial cut, did you?

11 A That's correct.

12 Q Now, turning to page 25, in the first
13 paragraph on that page you refer to an 84 percent
14 response rate, correct?

15 A Yes, we do.

16 Q And that 84 percent is 198 divided 237,
17 is it not?

18 A That's correct.

19 Q But, really the sample frame that was
20 chosen based on all these statistical formula and what
21 not was 244, correct?

22 A No, 244 were selected by Doctor Bardwell.
23 When we obtained the 237 we communicated --
24 communicated with him that there were seven for which
25 we really could not include those. He said there was

1 no need to alter the sample. So, in terms of response
2 rate for the survey he accepted the 237 as an
3 appropriate sample.

4 Q Did he do any tests to determine whether
5 237 got the same sampling representativeness as with
6 244?

7 A I couldn't comment on that. I don't know.
8 We're talking about one or two systems or two or three
9 systems maybe in the stratum. So, just generally I'd
10 be surprised, but I couldn't comment about what he
11 did.

12 Q So, is it your position that the proper
13 number in the sample was not what resulted from
14 putting together these various strata and following
15 all these various formula, but the 237 that you
16 finally came up with?

17 A No. In fact is -- what followed from the
18 formula of which the 237 is being appropriate was
19 accepted by Doctor Bardwell as satisfying sample
20 requirements.

21 Q Now, of the 198 187 responded to question
22 four, did they not?

23 A That's correct.

24 Q And the other 11 people -- do you know why
25 they were not included in the final study?

1 A Yes. There were eight who did not answer
2 the question, refused to answer the question. There
3 were -- there was one in which the sum total of the
4 responses was in excess of 100 percent, as you had
5 asked about earlier. And there were two in which an
6 answer was included for PBS stations -- distant PBS
7 stations where there were not distant PBS stations
8 carried.

9 Q You mentioned this morning, did you not,
10 that five systems that you had originally counted were
11 actually formed two systems in '89 -- 1989? What did
12 you do with those five systems?

13 A I don't believe that I mentioned that this
14 morning. I don't recall mentioning that.

15 Q Do you know whether any systems that you
16 had originally identified as Form 3 systems from the
17 88-2 Statements of Account became Form 2 systems in
18 1989?

19 A It's my recollection that -- that -- that
20 there were some, but it was a small number. I don't
21 know if we cited that.

22 Q I think you said it was five and it was
23 two percent of the sample.

24 A The two percent referred to systems that
25 were in the 89-2, but were not in the 88-2.

1 Q Okay. What do you mean? They were not
2 in the 88-2?

3 A They were not in the universe of Form 3
4 systems in 88-2.

5 Q But, they were partly --

6 A But, there was -- the system -- the new
7 systems -- it was 100 and some systems in total that
8 appeared in 89-2 that were not in 88-2, but in the
9 aggregate my recollection is that they accounted for
10 1.8 percent of the revenues paid in 89-2.

11 Q Well, now I'm confused. There were some
12 systems that got in your survey that were not in the
13 88-2 Statements of Account -- did not have an 88-2
14 Statement of Account? Is that what you're saying?

15 A No. There were no systems in our survey
16 that did not have an 88-2. Our -- our sample was
17 drawn from the 1,977 systems that were in 88-2
18 universe. The reference to 89-2 was simply to say
19 that since we had used 88-2 in order to do a timely
20 survey, the question was then raised as to whether
21 there were any meaningful differences between 88-2 and
22 the 89-2 systems.

23 An analysis was done of that which
24 indicated that there were systems in 89-2 -- not in
25 our survey, but in the 89-2 universe -- that were not

1 in the 88-2 universe and that those systems in the
2 aggregate accounted for 1.8 percent of the revenues--
3 of the royalties.

4 Q Okay. But, there were systems that in 88-
5 2 were Form 3 systems that were included in your
6 sample, were there not, and then in 89 became Form 2
7 systems?

8 A It's my understanding that that's the
9 case.

10 Q And are those counted within the 187
11 respondents to question four?

12 A I don't know whether there were any of the
13 187 in 88-2 that dropped out in 89-2. I couldn't
14 answer that.

15 Q Do you recall what the response rate was
16 in the 1983 study?

17 A First of all let me clarify, one thing I
18 do recall with respect to your last question though
19 is that our 88-2 systems, the 187 systems, accounted
20 for 27 percent of the royalties that were paid in 88-
21 2.

22 And looking -- which is a large sample -
23 - and looking at 89-2 those same systems accounted for
24 25 percent of the royalties in 89-2. So, the fact is
25 that they represented virtually the same universe --

1 as large a universe if we used 89-2 as a base then
2 if we had used 88-2 as a base.

3 Q You also testified, did you not, that 1.8
4 of all the systems in the 88-2 accounted for 18
5 percent of the royalties?

6 A That's correct.

7 Q Were those 1.8 systems the 35 in your top
8 stratum?

9 A Yes, that's correct.

10 Q So, we know that the top stratum accounted
11 for 18 percent of the royalties out of 27 percent,
12 correct?

13 A 18 percent of the total royalties.

14 Q Right. And you just said that 27 percent
15 of the total royalties was accounted by all 187
16 systems in your sample, is that right?

17 A That's correct.

18 Q So that the remaining three strata only
19 accounted for nine percent of the royalties, correct?

20 A In terms of the 187 systems in the sample,
21 that would be correct.

22 Q Now, the change that you've just discussed
23 with us with the amount of royalties, what stratum
24 were those changes from, do you know?

25 A When I talked about the 27 percent and the

1 25 percent, we looked at all 187 systems. Excuse me.
2 There -- you know, when you refer to the 187, the 17.8
3 percent or the 18 percent as indicated on page 24 of
4 the 35 systems accounting for 18 percent is of the 244
5 original sample.

6 I -- in looking at the number of
7 interviews that were completed and therefore included
8 in the 187, we have not -- I don't recall that
9 tabulation. So, I would have to correct my earlier
10 answer where you said in the 27 percent, which refers
11 to 187 systems, with 18 percent of that the large
12 systems. The answer to that is no. The 18 percent
13 refers to the full 35 systems and we, of course, did
14 not survey all of those 35 systems. So, I would have
15 to correct that earlier answer.

16 Q And you don't know what percentage of the
17 royalties was accounted for by the systems that you
18 did survey from the top stratum?

19 A We have done that analysis. I don't
20 recall it at this point. We could certainly supply
21 that to the Tribunal. We have an analysis of that.

22 Q Is it available to you in this room?

23 A I don't have it right now, but I don't--
24 I'm sure that we can supply it.

25 Q The response rate that you testified for

1 the sample is 79 percent, is that correct -- on page
2 two, for example, I think is one place where you
3 discussed this? The paragraph right above "survey
4 results."

5 A 79 percent is 187 over 237.

6 Q And if we counted all 244 of the response
7 rate, it would be somewhat lower, would it not?

8 A That's correct.

9 Q Now, do you recall what the response rate
10 in the 1983 study was?

11 A Only vaguely. It was somewhat higher and
12 I think on the order of 90 percent.

13 Q Does 93 percent ring a bell with you?

14 A I don't recall. It was on the order of
15 90 percent is my recollection.

16 Q Let me just show you, Mr. Bortz, the copy
17 of Sports Exhibit 1 in the 1983 proceedings and ask
18 you if you recognize this as the report you supplied
19 in that proceeding?

20 A Yes, it is.

21 Q And I refer you to page 21 of that exhibit
22 and do you see that the response rate is roughly 93
23 percent?

24 A Yes. 92.9 percent, that's correct.

25 Q Now, do you consider the drop from 93

1 percent to 79 percent to be significant?

2 A I think that's a question that is to be
3 answered by the statistical expert and his acceptance
4 of the 80 percent. He said that was an adequate
5 response rate.

6 Q Now, do you recall testifying in the 1983
7 proceeding about the response rate?

8 A I sure do.

9 Q And do you recall that you indicated, did
10 you not -- and I'm going to refer you to page 837 of
11 the transcript of July 1, 1985 and ask you to read the
12 question and answers about whether you were
13 comfortable with the response rate you got? Could you
14 read?

15 A Sure.

16 Q Just this part into the record.

17 A The question was "so you were completely
18 comfortable with the response rate that you got." And
19 my answer was "very pleased. I would have been
20 pleased with something even lower than that. Would
21 Doctor Bardwell" is the question. My answer "Doctor
22 Bardwell will fight for every point."

23 Question, "but he's okay with 93 percent?
24 He's very pleased with 93 percent" was my answer. "I
25 think he would have kicked if we were something below

1 90."

2 Q And my question to you is did Doctor
3 Bardwell kick when he found out that the response rate
4 in this study was 79 percent?

5 A He did not kick. He found that it was
6 quite acceptable and, I guess, it shows the fact that
7 I'm not able to calculate the confidence intervals the
8 way that he is.

9 Q And so is the response rate -- is it your
10 testimony that the response rate is just related to
11 the confidence intervals that you got those -- in
12 other words, you just expand the confidence intervals
13 and that takes care of the response rate?

14 A No. I believe that there are levels in
15 survey research where you begin to have significant
16 concerns about non-respondents. Doctor Bardwell had
17 determined for us that the 80 percent, 79 percent
18 response rate was -- was quite adequate that way.

19 Q Have you seen any tests on the
20 representativeness of your sample based on this
21 response rate?

22 A Representative with respect to what?

23 Q To the universe you were attempting to
24 study?

25 A Yes. There has been tests done. As I

1 mentioned this morning it's highly representative with
2 respect to the mix of systems. Obviously because of
3 the statistical design it represents very closely the
4 royalties that have been paid into the tribunal and
5 therefore is appropriate for dividing the total
6 royalty amounts.

7 Q And you indicated, did you not, this
8 morning that the sample under reported PBS stations?

9 A The sample did not have an adequate
10 representation of PBS stations, something on the order
11 of 14.4 percent in the sample versus 21 percent in the
12 universe.

13 Q Do you recall in the 1983 proceeding
14 whether you and under reported PBS stations?

15 A I don't recall that. I haven't had a --
16 I think I commented this morning that I thought it
17 was within reasonable bounds, but I don't recall the
18 actual numbers.

19 Q I'd like to show you page 846 of the
20 testimony and ask you to read the same testimony of
21 July 1st, 1985 and ask you to read the first paragraph
22 which is part of your answer into the record.

23 A Are you talking about this paragraph?

24 Q Yes.

25 A "I think the next question would be what

1 about systems that carried distant PBS and in our
2 sample there were 24 percent of our 169 systems
3 carried distant PBS. Just an aside, that is identical
4 to the 24 percent of all Form 3 systems that carry PBS
5 and just gives us further confidence in the level of
6 our sample."

7 Q So, in the 1983 proceeding you thought it
8 was important to mention that the same percentage of
9 PBS stations were in your sample that was in the
10 universe, correct?

11 A Well, in the 1983 proceeding this was
12 mentioned to indicate that the percentages given on
13 question four was to a universe that was
14 representative -- to a sample that was representative
15 of the universe.

16 As I mentioned in my testimony this
17 morning it was important for us to note that this year
18 we were not as fortunate. There is -- I'm not sure
19 of the precise number, but maybe a ten percent chance
20 of hitting right at the -- at the universe sample when
21 we're talking about stations that are carried on so
22 few systems.

23 And therefore, this year I had to caveat
24 our results to say that in addition to Form 1 and 2
25 not being represented here, we did under represent the

1 -- what would likely be the weighted value of Public
2 Broadcasting Stations.

3 Q Are you saying that there are so few
4 systems that carry PBS as a distant signal it was
5 difficult to get them in your study?

6 A Well, other -- other than the PBS and
7 Canadian categories all other categories of
8 programming are present on all the cable systems. So,
9 there -- that was not something that we had a control
10 for with respect to PBS when you are sampling.

11 But, in among that sample let's say there
12 are 100 balls and in -- in that sample of 100 balls
13 only 20 of them are black and the rest are white.
14 When you then take a sample of the 100 it's easy to
15 maybe not have a proper representation of the black
16 balls there.

17 And that -- that can happen when you have
18 a sub-sample that -- where carriage is limited to so
19 few systems.

20 Q But, in -- I'm sorry.

21 A And I would say -- I would say that that
22 would further extenuate the risk of that because the
23 carriage of PBS stations is disproportionately higher
24 in the lower royalty paying systems than you would
25 find in the higher royalty paying systems.

1 Q And did you think the fact that you had
2 under reported PBS stations would suggest that you
3 were getting more of the higher paying systems?

4 A No.

5 Q As compared to the universe?

6 A No.

7 Q I'd like to introduce into the record as
8 Program Suppliers Exhibit 1X a one page document upon
9 which we have compared the number of Form 2 systems--
10 I'm sorry -- the number of Form 3 systems that carry
11 a PBS distant station with the number in the sample.

12 This reflects the numbers that you have
13 previously given, does it not?

14 A Yes, of course.

15 Q Did you look at the types of markets to
16 determine whether or not your -- where the systems
17 were located to determine if your sample was
18 representative of the systems in those markets?

19 A Are you referring to geographic markets?

20 Q No, I'm referring to top 50, second 50,
21 smaller markets, outside all markets.

22 A The sample was controlled as to system
23 size and that was the determinant, not television
24 markets.

25 Q I'd like to have marked as Program

1 Suppliers Exhibit 2X a one page document that compares
2 the carriage -- the amount of carriage in different
3 size markets with the numbers included in the Sports
4 survey.

5 Now, Mr. Bortz, based on the number of
6 systems as shown on this exhibit, you had a
7 significantly higher percentage of systems from the
8 top 50 markets then did the Form 3 universe, isn't
9 that correct?

10 A That's correct.

11 Q And on the other side, in the smaller
12 markets you had significantly smaller representation
13 then in the Form 3 universe, is that correct?

14 A Well, let -- let me say first of all, that
15 we didn't control for top 50, second 50 and so forth.
16 That was one of many elements that surround this data,
17 but you can't control for.

18 My comment about having a higher
19 percentage -- I'm seeing this for the first time, but
20 I was off a bit. We would expect to have a higher
21 percentage in our 187 of large cable system because
22 of the design of the sample frame where we did a
23 census of the largest and one out of two of the next
24 size. Now, to the degree that the larger systems are
25 found in the top markets that would also be reflected.

1 But that's a secondary consideration. Again, the
2 control was to make sure that we adequately
3 represented the universe of royalty payers. And it's
4 simply due to the artifact of the sampling design --

5 I'm speculating without these systems being
6 identified -- but since we are sampling a much higher
7 percentage of large systems and large systems are
8 likely to be in larger markets, this would not be
9 surprising. It would be entirely consistent with the
10 sampling approach and is fully adjusted for in the
11 ratings that generate the final chart.

12 Q And are you aware that Joint Sports has
13 argued repeatedly to the Tribunal that systems in
14 larger markets value sports more than systems in
15 smaller markets?

16 A I think again the key is the royalty
17 payments. We controlled for the royalty payments
18 because that's where the dollars are coming from. The
19 royalties are -- I don't -- what I don't see here is
20 you've got percentage of Form 3 systems by market
21 type. But as we said, to do a sample based on number
22 of systems is inappropriate. So I really think that
23 this table is incomplete or misleading and that, in
24 fact, what you should have on here for me to make a
25 judgment would relate to the royalties that were paid

1 in.

2 Q But you stated that you knew by picking
3 the largest systems that it's likely you would have
4 picked systems that are also in the largest markets?

5 A No, I'm speculating that it might explain
6 the numbers that you have here, but that the sampling
7 by market size is not relevant to the task that we
8 addressed, which is to make sure that we adequately
9 represent the royalty payers. If they happen to be
10 concentrated in larger markets, well that's where the
11 revenues are coming from. I can't conclude that
12 they're concentrated because I haven't analyzed it.

13 Q But if they are concentrated and that
14 there is more interest in sports in large markets than
15 in small markets, that would be a bias in favor of
16 sports in your sampling test?

17 A Incorrect. No. I don't agree with that.
18 I would say that if there is more interest in sports
19 in large systems which pay large amounts of royalties,
20 then that's appropriately accounted for in the
21 statistical design that we've applied. And it would
22 be inappropriate to do otherwise.

23 MR. GARRETT: Mr. Chairman, can I just ask
24 a question here?

25 Are the data being offered here in Exhibit

1 2X taken from the survey questionnaire that we
2 provided to MPAA Cable Data Corporation?

3 MR. LANE: They were taken from the ones
4 that were provided to Cable Data Corporation.

5 MR. GARRETT: Thank you.

6 CHAIRMAN AGUERO: Please continue.

7 BY MR. LANE:

8 Q Is it your testimony that the only way to
9 determine whether the sample is representative is by
10 looking at royalties?

11 A No, that's incorrect. As I explained this
12 morning, royalties is the appropriate way to select
13 the sample. That is the key variable that you use.
14 You then want to go back and check to identify whether
15 or not it represents it on certain other key
16 characteristics.

17 As I indicated this morning, it is
18 representative with respect to the number of
19 superstations carry, the number of other independent
20 signals carried, the number of network, distant
21 network affiliate carried and it was in that checking
22 that we identified that it under represented the
23 public broadcasting stations.

24 MR. LANE: Mr. Chairman, I'd like to have
25 marked as Program Suppliers Exhibit 3X a one page

1 document on which we have put the percentage of
2 distant Form 3 table subscribers accounted for by
3 station and Joint Sports Survey based on 89-2 data and
4 we anticipate expression from Mr. Garrett. This is
5 also taken directly from the information that was
6 given Cable Data Corporation, not the questionnaires
7 that were given to us.

8 (Whereupon, the document was
9 marked as Program Suppliers
10 Exhibit 3X for identification.)

11 MR. GARRETT: I'm sorry, I don't
12 understand.

13 MR. LANE: This is generated.

14 MR. GARRETT: This is not based on the
15 questionnaires that we provided you?

16 MR. LANE: Not the ones you gave to me,
17 but the ones that were provided to Cable Data.

18 MR. GARRETT: The ones that did not have
19 any of the identifying information redacted, is that
20 what you're talking about?

21 MR. LANE: Yes.

22 MR. GARRETT: All right. Thank you.

23 BY MR. LANE:

24 Q Mr. Bortz, this exhibit indicates that of
25 all the incidents in the Form 3 universe that the

1 independent stations in your sample accounted for 93
2 percent, yet network affiliates and educationals were
3 approximately 50 percent.

4 A I must ask you to describe what you mean
5 by "subscriber incidents."

6 Q You just haven't been around long enough,
7 Mr. Bortz. The subscriber incidents is the count of
8 all the subscribers to a cable system to which a
9 particular station is available.

10 A Well, I guess that I need more explanation
11 than that. It sounds good generally, but I still
12 don't understand quite the number that you have here.

13 Q Well, let's take an example. If system
14 A carries WTBS and it has 1000 subscribers, and system
15 B carried WTBS with 500, and so on and so forth, in
16 my example then WTBS would have 1500 subscriber
17 incidents in the calculation. That's how you
18 calculate it.

19 A All right.

20 Q So we have a situation where in the
21 stations included in your survey account for 93
22 percent of the independent station subscriber
23 incidents, but only roughly 50 percent of the
24 affiliates and the educational stations. Do you think
25 that this demonstrates that your sample was not

1 representative of the universe?

2 MR. STEWART: Mr. Chairman, may I ask if
3 we're going to have a sponsoring witness for this
4 exhibit?

5 MR. LANE: My understanding, Mr. Chairman,
6 is that Mr. Larson would be available. I don't --
7 this was generated by Mr. Larson and, as far as I
8 know, he certainly will be available to testify on
9 these matters.

10 MR. STEWART: My question if Mr. Lane is
11 able to tell us what he instructed Mr. Larson to do,
12 then that may be sufficient. But I would ask for a
13 clarification whether this is the percentage of
14 subscriber incidents on all Form 3 systems or just the
15 ones that are in the study, or either of those?

16 MR. LANE: I think it says on the top, and
17 what it is is for all Form 3 systems.

18 MR. STEWART: Thank you.

19 CHAIRMAN AGUERO: We'll take five minute
20 recess.

21 (Whereupon, at 2:41 p.m. a recess until
22 2:51 p.m.)

23 CHAIRMAN AGUERO: Please, Mr. Lane.

24 MR. LANE: Thank you.

25 BY MR. LANE:

1 Q Mr. Bortz, do you think that the
2 difference in the subscriber incidents for independent
3 stations as compared to network affiliates and
4 educational as shown on Exhibit 3X demonstrates that
5 the survey that you did is not representative of the
6 Form 3 cable universe?

7 A No, it doesn't. And the reason is that
8 this exhibit has in it the same flaw or incorrect
9 application of our sample that the prior one that you
10 gave me, I don't know what that was numbered.

11 Q 2X.

12 A 2X. And that is that as we have indicated
13 in some detail our sample is a stratified random
14 sample, not just a random sample. In applying the
15 stratified random sample, we then apply weights to
16 each of the systems in the sample. Those weights vary
17 by strata.

18 The only appropriate comparisons that you
19 could do would be after weighting the system in the
20 sample. To try and come up with comparisons like this
21 against a raw stratified random sample, I think, is
22 inappropriate.

23 Q You discussed this morning that weighting
24 did not have a material effect on your results, did
25 it?

1 A I think that that is a nonsecretor. What
2 I said this morning was that indeed we looked at the
3 results, the answers to question 4 in weighted and
4 unweighted form and found that they did not vary much.
5 On the other hand, the sample in order to compare the
6 sample and its projectability to the universe, you
7 need to apply the appropriate weightings. And
8 different systems are weighted at different levels.
9 And unless you've made that adjustment, you can't do
10 this.

11 These two exhibits, you know, have been
12 presented to me, I don't know the calculations that
13 were behind them. Nobody has represented precisely
14 how they've done. You've done a good job of trying
15 to describe it to me. But clearly to take our sample
16 of 187, which varies significantly by strata and to
17 apply that sample.

18 For example, we have very few for strata
19 1, low strata systems, in our sample relevant to the
20 universe but each one of those when we weight it back
21 up is appropriately weighted to represent that.

22 Q Well, is it your testimony that it's
23 possible that by weighting if we followed the
24 weighting in the survey, that we would adjust these
25 numbers so that they would all come out to be

1 comparable?

2 A To points. Number one, I have no idea how
3 this -- what the results of this analysis would be.
4 It does appear to me to be an inappropriate comparison
5 that you've done.

6 Number two, some very detailed comparisons
7 of our sample to the universe and its projectability
8 to the universe have been made and have been shown
9 that in all respects except the representation of PBS
10 stations, all key respects related directly to these
11 categories it is representative. So --

12 Q And those studies are ones that you
13 haven't shared with the Tribunal either?

14 A They're studies that counsel had prepared
15 to look at our sample.

16 Q But you haven't shared them with the
17 Tribunal or with us, have you?

18 A I'm not sponsoring those studies.

19 MR. GARRETT: We'll be happy to make them
20 available if the Tribunal so wishes.

21 MR. LANE: Well, Mr. Chairman, it's kind
22 of difficult for me to discuss and look into the
23 validity of those studies when I don't have them, but
24 the witness every time I ask him about something he
25 answers, "Well, that's not the appropriate one, but

1 there's some other one that no one in this room has
2 ever seen except him and his counsel and you've got
3 to trust me that those show were representative." I
4 think it's a little bit difficult for us to cross
5 examine on that.

6 MR. GARRETT: Mr. Chairman, I felt much
7 the same way when Mr. Cooper last week kept referring
8 to these CONTAM studies done in 1970 and 1980. The
9 difference here is that we will make available, if the
10 Tribunal so allows, the particular study that Mr.
11 Bortz is referring to. If it's relevant to the
12 Tribunal, if it'll help the Tribunal's process, we're
13 happy to make it available.

14 CHAIRMAN AGUERO: We will decide when we
15 need it.

16 BY MR. LANE:

17 Q Mr. Bortz, is it your testimony that if
18 a sample is representative on some points, that it's
19 representative overall?

20 A I think that's a broad generalization, Mr.
21 Lane. What I said is that the sample properly
22 represents the royalties that have been paid in and
23 the task of the Tribunal is to divide those royalties.
24 That is key. We checked it against other major
25 elements. But I can compare it to viewing studies

1 where the sample is selected, but you certainly in
2 Nielsen or Arbitron rating studies don't control for
3 a whole host of other aspects. You retrospectively
4 might ask and look back at its representativeness, but
5 you have to in selecting a sample, in order to make
6 it a reasonable one, identify the major parameters.
7 And the major parameter here is quite simply royalty
8 payments, because that's what's being distributed, and
9 that sample is appropriate. And so I think in terms
10 of all important respects, it is representative with
11 the sole exception of representation of PBS stations.

12 MR. LANE: I'd like to have marked as
13 Program Suppliers Exhibit 4X a one page document
14 entitled Number of U.S. Television Stations Carried
15 Form 3 Full Time Distant Signal 89-2.

16 (Whereupon, the document was
17 marked a Program Suppliers
18 Exhibit 4X for identification.)

19 MR. GARRETT: Mr. Chairman, may I ask
20 whether the data in Exhibit 4X here also were taken
21 from the survey questionnaires that we provided to
22 MPAA and Cable Data Corporation?

23 CHAIRMAN AGUERO: Mr. Lane?

24 MR. LANE: They were taken from the data
25 that were provided to Cable Data Corporation.

1 MR. GARRETT: Thank you.

2 BY MR. LANE:

3 Q Now, Mr. Bortz, on this exhibit what we've
4 done is just taken the number of independent stations
5 that showed up in the sports survey as compared to the
6 number of independent stations that were carried by
7 Form 3 systems. And the same with affiliates and
8 educationals.

9 Does the result here of a higher
10 percentage of independent stations compare to the
11 total Form 3 universe call into question the
12 representativeness of your sample?

13 A No, it does not.

14 Q Why is that?

15 A Again, you would have to look at the
16 weighted value of each of these. When a station is
17 carried, let's say it's a particular independent
18 station, and it was carried by a system and the system
19 general manager responded to the survey, the next
20 question is how is that weighted in the response.
21 Again, I'll have to refer you to the, with apologies -
22 - to the study that you haven't seen but I haven't
23 seen any of these tables before, that compared the
24 representativeness of our sample key characteristics
25 and found that it very closely matched the universe.

1 Without your going into that, I suppose I'm not going
2 to be able to persuade you of it, but I must say that
3 these -- what I view as rather simple comparisons they
4 take no account of the fact that the stratified random
5 sample, which is absolutely fundamental to our study,
6 simply don't demonstrate any.

7 Q Do you think that there's no way a
8 stratified random sample would have the same
9 percentages of each type of station in the universe?

10 A I think there are appropriate ways of
11 making the comparison and in the referenced study,
12 those -- that appropriate comparison has been made.
13 I'd have to refer you to the study. It is certainly
14 possible to compare our sample to the universe on a
15 number of factors, but it can't be done by
16 simplistically listing stations in a stratified sample
17 and listing stations in a universe. That would be a
18 distortion of what our sample purports to represent.

19 Q Your study says nothing about Form 1 and
20 Form 2 systems, does it?

21 A That's correct.

22 Q And in your view this is not a problem,
23 is it?

24 A We called it to the attention of the
25 Tribunal this morning, the fact that there are two

1 percent of the royalties that are not represented at
2 all by our sample.

3 Q Are you aware that there are approximately
4 9500 Form 1 and Form 2 systems in the United States?

5 A I'm not aware of the precise number. What
6 is being divided here is a pool of royalties, and I
7 know that those systems in the aggregate must account
8 for only about 2 percent of the royalties.

9 Q So that you don't think it makes any
10 difference that there are nearly five times as many
11 Form 1 and Form 2 systems as there are Form 3 systems,
12 but you've given no consideration to that in your
13 study?

14 A Well, two things. First of all, it's
15 clear that 98 percent of the royalties paid in are
16 appropriately allocated through the technique that we
17 have applied here. So we're talking about two
18 percent. I think two percent certainly needs to be
19 considered.

20 We also did in 1986 a random sample of
21 systems which over represents those smaller royalty
22 paying systems. Still Form 3, indeed, but we found
23 not much difference. We looked at the difference in
24 response by strata here going from very high systems
25 down to anything above \$2190, and we found there was

1 no variation. I suppose you could postulate that
2 something magic happens at \$2190 and although we were
3 constant from \$300,000 down to \$2190 in terms of
4 valuation, that suddenly that little group below \$2190
5 values it differently. I can't reject that, but I
6 would be unlikely to accept it.

7 Q Was the interviewing in the sample
8 entirely conducted by phone?

9 A Entirely by phone. That's correct.

10 Q How long did a typical interview take?

11 A I think they generally ranged from five
12 to ten minutes.

13 Q Turning to page 32, the way the sample is
14 set up you ask for the system manager first. Correct?

15 A Yes.

16 Q If the system manager was available and
17 answered the phone, you didn't go any further, did
18 you?

19 A That's not correct. At question 1 --
20 Let's say that we got the system manager. They called
21 and asked for the system manager and got the system
22 manager. They would then get the introduction and
23 then a question: "Are you the person..." -- asking
24 the General Manager -- "...the person at your system
25 most familiar with programming?"

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1 If not, then the person most familiar was
2 put on. So we didn't assume that the General Manager
3 was most familiar, although I'm sure, in the majority
4 of instances, he probably was.

5 Q Did you ask any question of who was the
6 person most familiar with program budgeting?

7 A No. It was with programming, and
8 programming could include program budgeting, might be
9 separated out; but, typically, if the programmer
10 doesn't do the budgeting, he sure as heck knows what
11 the budget is.

12 Q But you didn't ask the question, if that
13 was the person most familiar with the budgeting?

14 A The question that we asked was most
15 familiar with programming, which we believe includes
16 that.

17 Q What is your basis for assuming that the
18 person most familiar with the programming was familiar
19 with the budgeting?

20 A The cable systems are operated with
21 budgets, as any other business. Somebody who is
22 familiar with the programming is going to be familiar
23 with the program budget. They might not have done the
24 budget.

25 Q Well, I might be a cable subscriber, and

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1 I'm familiar with the programming on the cable system.
2 I'm not at all familiar with the budgeting.

3 A Well, I don't think that applies to cable
4 executives.

5 Q So is it your view that any cable
6 executive at the system level who knew about
7 programming would know about budgeting?

8 A I believe that they would understand the
9 budget issues related to programming. Yes, sir.

10 Q And would they perform the task of
11 budgeting for programming?

12 A Well, I've answered that question, and I
13 said that that's not necessarily the case, but they
14 would be familiar with the task.

15 Q But do you know whether they would be the
16 ones who frequently perform such an exercise?

17 A We didn't ask that question.

18 Q No, but on page 7, that is what you state
19 is what the respondents were performing, do you not?

20 A We were asking them to allocate a fixed
21 program budget. That's correct.

22 Q Right, and you state, and I quote -- It's
23 on page 7 under Bullet 2: "...similar to a task which
24 they frequently perform." Did I read that correctly?

25 A That's correct.

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1 Q My question is what control did you have
2 in the survey to show that the person responding
3 frequently performed such a task?

4 A Well, you incompletely characterized Item
5 2 which said they frequently performed both explicitly
6 in developing program budget and implicitly in
7 evaluating price value relationships. It's not
8 necessarily clear to me that you would focus just on
9 the individual who was doing a budget process. You
10 might then have an administrative person.

11 As we discussed this morning, and it's
12 important to keep in mind, what we're talking about
13 here is a confluence of many factors that relate to
14 marketing, subscriber acquisition, subscriber
15 retention, budgeting.

16 All of these go into value, and for me to
17 deal with somebody with a green eyeshade only, to have
18 restricted the questionnaire to the individual who did
19 the budgeting, I think, would not give us as adequate
20 a set of respondents as what we have.

21 Now I'll go back also to what I said this
22 morning, that ninety percent of the respondents were
23 either the General Manager, and that was the
24 overwhelming percentage. They were the top person at
25 the system. It was a majority of respondents,

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1 followed by the marketing and programming people.

2 In fact, by dealing with those individuals
3 rather than, say, with the accountant, I believe we
4 have a better response than if we do what you seem to
5 be suggesting.

6 Q Is the marketing director -- Would the
7 marketing director have -- What parts of the various
8 hats would the marketing director alone have?

9 A Well, a marketing director will have a
10 substantial input into what's carried, because the
11 marketing director is looking at what is it that some
12 individuals out there who aren't now our subscribers
13 -- what is it that they want? What can I sell to
14 them? What can get them to decide suddenly to add a
15 thirty dollar a month obligation to their budget?

16 Q Would that --

17 CHAIRMAN AGUERO: Mr. Bortz, how large is
18 the personnel in a cable system? The personnel -- how
19 large?

20 THE WITNESS: Well, it really --

21 CHAIRMAN AGUERO: For marketing, they have
22 a public relations. They have a general manager, and
23 they have a salesman.

24 THE WITNESS: Well, it varies tremendously
25 by system.

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1 CHAIRMAN AGUERO: Around 100 persons, 200,
2 270 or what?

3 THE WITNESS: Oh, I think you'll find some
4 systems where in the office there might not be more
5 than two or three people. Might be an office manager.
6 You'll have other systems that might have thirty or
7 forty people.

8 I think that getting up into the hundreds
9 would be quite unusual.

10 CHAIRMAN AGUERO: Unusual, yes.

11 THE WITNESS: So very often, the general
12 manager is performing the function also as marketing
13 director in a smaller system. The larger the system
14 gets, then they begin to specialize in their tasks,
15 and you get a marketing V.P. or you get a programming
16 Vice President. That varies with systems.

17 So that the program decisions depend upon
18 the size of the system.

19 CHAIRMAN AGUERO: The question -- Out of
20 the ninety percent of the respondents were the cable
21 manager. No?

22 THE WITNESS: Cable manager, which was the
23 majority of that. I don't recall the precise
24 percentage, but it was more than half of that ninety
25 percent. Then marketing directors and some

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1 programming people.

2 CHAIRMAN AGUERO: Thank you.

3 BY MR. LANE:

4 Q Mr. Bortz, did you make any study of what
5 gender the respondents were?

6 A What gender the respondents were?

7 Q Yes.

8 A No, we did not.

9 Q Is that something that you think should
10 have been considered?

11 A No, I don't. I think it's the
12 professional position and knowledge that is a key, not
13 the sex of the respondent.

14 Q Are you aware that there is a generally
15 recognized bias among males toward Sports programming?

16 A Well, I think it's clear in our
17 administration of the survey that we're talking to
18 people in the performance of their professional
19 duties. I spend a lot of time with cable and
20 broadcast television executives.

21 I have worked for ABC, been on a retainer
22 with them since 1979. I can tell you that their
23 viewing habits and my viewing habits have very little
24 to do with the audiences that we're dealing with.

25 I can't imagine that, in responding on a

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1 professional survey where we're talking about their
2 subscribers, where the success of their system means
3 being in tune with, being knowledgeable about their
4 subscribers, that they would confuse their personal
5 programming preferences with the preferences of their
6 subscribers, nor would they confuse personal
7 preferences with their valuation to the system of
8 different categories of programming. I can't conceive
9 of that, Mr. Lane.

10 Q How do you the respondents know what types
11 of programming are carried on the stations that are
12 available as distant signals?

13 A In Question 2 we listed the signals. We
14 asked them if there were changes. We repeated the
15 stations to them. These are individuals at the
16 system. We're not interviewing as, say, in the BBD&O
17 study that was done in 1979 -- We're not going to a
18 headquarters that's 500 miles away.

19 These are people who are at the system,
20 and I believe that they certainly are well acquainted
21 with what is carried on their system.

22 Q Well, they may be well acquainted with the
23 channels that are carried on the system, but how are
24 they acquainted with the programming on those
25 channels?

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1 A They're in the business, Mr. Lane. You
2 don't act in an executive capacity in the business
3 without understanding the product you're selling. I
4 think that that is very difficult to imagine.

5 Q You indicated that the systems do
6 subscriber surveys. Correct?

7 A Systems and multiple system operators, the
8 group operations do subscriber surveys. That's
9 correct.

10 Q Is there any -- Do you have any knowledge
11 of how many of the systems that responded to your
12 questionnaire did such a survey in 1989?

13 A No, I do not.

14 Q When they do the survey, do they do it on
15 a channel basis? In other words, they ask about WTBS,
16 ESPN, MTV?

17 A That varies, and it varies by survey
18 design. In some cases, they might be asking about
19 specific channels. In other cases, it could be
20 program categories where they are trying to identify
21 where they need to strengthen or reduce the amount of
22 a certain program category. I've seen surveys which
23 do both.

24 Q In your knowledge, have you or your
25 company ever been involved in a survey of just distant

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1 signal programming by a cable system or an MSO?

2 A Not that I can recall.

3 Q The timing of the survey was done in
4 response to the Tribunal's concern, was it not?

5 A The fact that it was done in 1989 and
6 early '90 was in response to the Tribunal. That's
7 correct.

8 Q Do you think that the respondents were
9 able to recall the entirety of 1989 programming on
10 several stations as distant signals in a five to ten
11 minute phone interview?

12 A I believe the respondents were able to
13 characterize to us quite clearly the relative value
14 and allocation they would make to a signal that was
15 carried in '89.

16 I think that, in making these decisions,
17 if they were in a marketplace and coming to a table
18 and negotiating and talking to a new cable program
19 network where some network is asking for X cents per
20 month subscriber fee, they make these judgments all
21 of the time.

22 I have to say that I've never seen them
23 revert to detailed viewing studies or viewing hour
24 calculations in order to make it, because what they're
25 combining is -- Let's come back to it again. Audience

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1 is a factor, but audience broken down in lots of ways.

2 Viewing hours -- To my recollection, I
3 have never seen that. There are other ways they look
4 at it. They look at popularity, and they look at have
5 people called us on the telephone. They look at can
6 we put it in our marketing package? Does this make
7 this package look more attractive?

8 We tried to bring together all of those
9 factors that an executive brings together when they
10 make a marketplace decision; and believe me, they
11 don't retreat to ratings books to decide how they're
12 going to make that decision, because if they did that,
13 they would lose so many other factors that are crucial
14 to the cable business.

15 You just can't do it that way.

16 Q Mr. Bortz, I'll ask you again. Do you
17 think they could remember all the programming
18 throughout the year on the several stations that they
19 had available as distant signals at the time when you
20 asked them the question?

21 A Well, I believe I answered that, and I
22 said, no, and I didn't think it was relevant for them
23 to remember that. It was a general impression,
24 general knowledge of what's on the signal, and to
25 remember each and every program, in fact, doesn't

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1 figure into their decisions.

2 I think the fact that that can't be done
3 is a further question raised about trying to use such
4 measurements as a measure of value, because since they
5 don't, how can it be a measure of value?

6 Q When you do these interviews with cable
7 systems about a new programming service, do they ask
8 you what types of programs will be available on it?

9 A That's fundamental to these surveys. They
10 want to know what kinds of programming, not the
11 specific programs but what types of programming would
12 be on these services. Yes.

13 Q If it was a service that was already in
14 existence, would they ask to see what kinds of
15 programs were available throughout a given period, how
16 much of each type of program is available?

17 A No.

18 Q They wouldn't care what the programming
19 was?

20 A Sure, they would care, but if it's a
21 service that's already available, they would be
22 knowledgeable about it and have, again, a general idea
23 of the mix and content. If they didn't, sometimes a
24 new service -- a new service now, not an existing one
25 -- might try to put together a demonstration tape to

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1 illustrate the types of programming. We've seen that
2 done, but nothing beyond that.

3 Q So it's whatever impression they had of
4 the programming at the end of the year or the
5 beginning of 1990 that was all you think was necessary
6 for them to answer your questions?

7 A I think you mischaracterized my testimony.
8 I think that they take into account a number of
9 concrete factors. They take into account the type of
10 programming. They take into account how that might
11 be used in promotion and marketing, and they take into
12 account pricing.

13 It is a complex decision making process
14 in the marketplace, and it's the complexity of that
15 -- Although it would be nice to be simple and say
16 here's a book and here's the numbers, it's the
17 complexity of that, when executives make decisions,
18 that the constant sum survey technique attempts to
19 apply in order to get a proper representation.

20 I think, as you will hear from others who
21 will testify after me with regard to that, people who
22 are in businesses where they are marketing things,
23 where they're selling something, where they have
24 customers who have to make a monthly decision,
25 frequently use this type of research to do it, so they

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1 don't come out with an Edsel, which you can do if you
2 ignore careful analysis of all of the factors going
3 into a buying decision.

4 Q What pricing did the respondents take into
5 account in responding to your questions?

6 A What we did was to use a -- to refer to
7 a fixed program budget. We don't know what that
8 program budget was that they had in their mind, but
9 that it was a fixed budget which they were allocating.

10 Now they might have thought about the
11 budget that they've got lying on their desk in front
12 of them. They might have recalled what they paid in
13 89-2 filing or 89-1 filing in thinking about that.
14 We don't know that, but we said, relative to a fixed
15 program budget, how would you allocate it.

16 I think that that is appropriate in a
17 broadbased survey like this.

18 Q Do you think that -- Was there something
19 to key the cable subscribers to the fact that this was
20 a copyright question?

21 A Well, first of all, we didn't talk to
22 cable subscribers.

23 Q I'm sorry. Cable systems.

24 A There, we would hope, was nothing there
25 that would suggest that it was that. Burke had no

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1 idea that this research was connected to it. So the
2 interviewers who called had no idea that it was
3 connected to it, and it is not unusual.

4 They hear from us, and they hear from
5 other research companies from time to time that talk
6 about popularity of programming. So --

7 Q Excuse me. So is there any reason --

8 MR. GARRETT: May he finish his answer?

9 MR. LANE: I'm sorry. I thought he was.

10 THE WITNESS: Well, I was just going to
11 say, the reason that we put this question last was
12 that we didn't want to get into an allocation
13 procedure early on and have people speculate and
14 whatever. That was the last question in the survey.

15 BY MR. LANE:

16 Q So when you earlier referred to the fact
17 that they might have the 89 royalty payment -- 89-1
18 royalty payment, and that might be their budget, there
19 was nothing in your questionnaire that would lead them
20 to that thought, was there?

21 A No. I mean, it could have been any one
22 of a number of dollar numbers that they had in their
23 head.

24 Q What prices did they consider for the
25 individual program categories?

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1 A The constant sum survey technique is to
2 get a relative pricing within the fixed program
3 budget. So they didn't affix a dollar amount. I
4 believe in one of the prior early surveys that was
5 done for the Tribunal, it was dividing \$100 or you can
6 have \$1,000.

7 We didn't do that. We said a fixed
8 program budget. Let the respondent fix in his mind
9 what he thinks is a reasonable program budget. How
10 are you going to divide it up.

11 Q But you don't think they need to know what
12 the price of the individual programs were, like Sports
13 programs, Syndicated programs, to make that budget?

14 A Well, let me go back and emphasize.
15 There's just so much you can do in studies like this.
16 What we did was to get the relative value of the
17 programming as seen by the buyer, the cable system.

18 A price can only be established in a
19 marketplace when buyer and seller come together. Now
20 I have repeatedly seen what happens when the
21 marketplace allows buyer and seller to come together,
22 and we have evidence there.

23 The increase in Sports rights that have
24 been paid is a result of the intensity of demand for
25 Sports programming and the relative supply and demand

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1 when they come together. The fact, as I mentioned
2 earlier this morning, and I think it's very crucial,
3 we can look at the marketplace and look at what they
4 pay for Basic cable networks.

5 I cited some examples this morning. I
6 won't go over them unless you want to hear it again,
7 but it's quite clear that prices are established in
8 that way, and quite consistent with the findings of
9 our survey, which is that Sports is an intense demand.

10 Q But you don't know -- Would it be possible
11 to make a budget of seven or eight items unless you
12 knew what the cost of those items were?

13 A They knew the cost, the fixed program
14 budget. Whatever that was in their mind, that was the
15 total cost. That's what --

16 Q They know the total cost.

17 A The total cost was that --

18 Q Now do they know the cost of the
19 individual items within that?

20 A Well, they established within that -- In
21 the absence of there being a seller -- Okay? There
22 was no way that I've been able to conceive of that,
23 in this kind of research or any that I've seen that
24 have been presented to the Tribunal, that you can
25 bring the seller into the process. We can't do gaming

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1 here.

2 So, unfortunately, we have to stop at the
3 buyer. The buyer is measuring the relative value to
4 a designated and fixed supply. That designated and
5 fixed supply is the programming that they were
6 carrying in 1989.

7 So the buyer knew what the supply was.
8 The buyer had in his mind a fixed program budget to
9 get that supply, and divided that budget against that
10 supply. I think that's as close to simulating the
11 marketplace as you can come.

12 Q Now on page 7 you refer in Bullet 2 to a
13 price/value relationship. Do you see that?

14 A Yes.

15 Q Could you explain what you meant by that?

16 A Well, we're talking about something they
17 do explicitly, which is the program budget; and the
18 implicit price value says, okay, I've got a budget,
19 how important is it to me to have live Sports? Am I
20 willing to stretch my budget to get it? What about
21 Movies? How much am I willing to do there?

22 When they do that, they think -- We've
23 been through it before, and I won't bore the Tribunal
24 with it. They think of a whole host of factors that
25 go into a cable executive's decision making, and

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1 establish in their mind a value.

2 They don't go through any kind of
3 psychometric scales or econometric scales to establish
4 that. It's how an executive -- When I negotiate
5 across the table with a broadcaster who wants to carry
6 the Dallas Mavericks, and I am saying that the Dallas
7 Mavericks' rights values are up here and he wants to
8 pay something less, he makes some evaluations.

9 We negotiate, and we end up with a price.
10 What we're trying to do is to get a good picture or
11 reading of what's in the mind of the buyer, and I
12 believe we've done it.

13 Q And it's your testimony, or am I
14 incorrect, that the buyer does not need to know what
15 the price is of, for example, Live Sports programs?

16 A I think that this is the best that we can
17 do in the absence of a free marketplace. We have
18 examples. Let me give you one example.

19 If you take a look at -- and we'll show
20 how this is unrelated to viewing. Take a look at
21 ESPN, and I know what the cable operators have
22 negotiated for over and over on ESPN, across the
23 country.

24 Now take a look at USA Network, which is
25 owned by MCA and Paramount, which has a lot of

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1 Syndicated and Movies. It has some Sports, certainly
2 not anywhere near the Sports content of ESPN, and
3 they've negotiated.

4 I look at the ratings that they get, and
5 what do I find? I find that they have paid almost
6 three times as much per rating point -- per rating
7 point -- The fee that they have negotiated and they
8 are paying to ESPN is almost three times as much per
9 rating point as what they pay to USA or Family
10 Channel, which has a lot of Syndicated programs. Used
11 to be Christian Broadcast Network.

12 They pay, I believe it's five times as
13 much. So you look in the real marketplace. That's
14 the only window we have, is to look at where have
15 cable operators and program networks gone on eye to
16 eye?

17 There are some examples. I suggest that
18 they are useful, and it's clear to me that they pay
19 a lot for that. TNT, which has a high Sports content,
20 has invested in major high profile programs, similarly
21 gets a higher fee, substantially higher fee than USA
22 or Lifeline or Family Channel.

23 Q Are you saying that price and value are
24 the same thing?

25 A Price and value are not. We talk here

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1 about a price/value relationship. You can talk about
2 a supply/demand curve. We could draw the academic
3 curves on it.

4 What I'm saying is that there is a
5 marketplace for cable programming, and that
6 marketplace is embodied not only in the example I gave
7 with Basic Cable Program Network, but in what's paid
8 for Sports rights, put on a regional Sports network,
9 and a whole host of those.

10 What we find is quite consistent here.

11 Q In your study, are you saying that price
12 and value are the same thing?

13 A I thought I answered that, that price --

14 Q I don't believe you have, Mr. Bortz, or
15 I wouldn't have asked you.

16 A Well, let me attempt to. Price is where
17 supply and demand come together, and when they achieve
18 an appropriate balance in a free market, that
19 establishes price.

20 Now value is related to the demand curve,
21 and the supply, position of the copyright holder,
22 where else they can sell the programming helps
23 establish the supply curve. Where those two intersect
24 and you get a stable market -- That's price.

25 Have I clarified the difference between

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1 price and value?

2 Q Can you determine value without knowing
3 the price?

4 A The demand curve -- For a fixed set of
5 programming, there is a demand curve. It's the
6 intersection of supply and demand that set the price.
7 So the demand curve -- If we were able to define a
8 specific program, what we would have is a demand curve
9 which would say at this price, this percent of
10 systems, we want to add a lower price, more systems.

11 You know, it's not in the real world
12 probably a continuum, but the economists use that.
13 So there is a level of demand for each price.

14 Q Is that price the same as the value of the
15 programs?

16 MR. GARRETT: Mr. Chairman, this is the
17 third time he's asked that question. I like the
18 answer, and I'll be glad to hear it again, but,
19 really, I do think it's been asked and answered.

20 MR. LANE: I don't believe it has, Mr.
21 Chairman.

22 MR. GARRETT: I'll object.

23 THE WITNESS: I'll try one more time.
24 Let me see if I can -- I'd like you to rephrase it
25 somehow.

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1 CHAIRMAN AGUERO: You want to rephrase the
2 question?

3 THE WITNESS: I'll be happy to try and
4 rephrase the answer.

5 CHAIRMAN AGUERO: Rephrase the answer.
6 Fine.

7 THE WITNESS; Is price and value the same?
8 What I say is value establishes demand, and demand
9 varies depending upon a price. So at each price there
10 is a certain level of demand.

11 If I raise the price, there's less demand
12 than there would have been at the lower price. So
13 they aren't the same. They interact. Where the
14 marketplace -- Where supply and demand come together
15 establishes the price, but for each price I've got a
16 demand. When they come together, we get a balance.

17 CHAIRMAN AGUERO: Does this answer your
18 question, Mr. Lane?

19 MR. LANE: I'll try another one, Mr.
20 Chairman.

21 BY MR. LANE:

22 Q Can you determine a budget when you have
23 competing programs that have met without knowing the
24 price of each of those individual program types?

25 A I'm not sure I understand the question.

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1 Q All right. Let's break it down. You have
2 a budget. Do you understand that part?

3 A This is a program budget?

4 Q It's a program budget.

5 A I'm right with you.

6 Q All right. You have competing program
7 types. You have that in mind. They're competing
8 because the budget is only so big and you've got five
9 or six categories, and they've all got a share of the
10 pie.

11 A Yes.

12 Q Can you determine how to create that
13 budget without knowing the price of each one of those
14 programming types?

15 A Okay. Yes. Let me give you an example.
16 I'm the buyer. I'm the cable guy that you called, and
17 my bosses at system headquarters or corporate
18 headquarters told me that I can spend X amount on
19 programming.

20 So I've got a fixed program budget, and
21 they say to me, go ahead now and decide what you want
22 to buy. I would go through, in a general way, an
23 exercise like this. I think we need to put a fair
24 amount toward Sports, a certain amount toward Movies,
25 even Religious.

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1 Guess what? I go into the marketplace,
2 and what I find is the Religious guys aren't trying
3 to sell me anything. It goes to your question that
4 I got this morning.

5 Okay. Now I'm in the -- I've gone from
6 this exercise, which is close to the marketplace. I
7 go into the marketplace, and they say, heck, we'll pay
8 you; we want you to take our programming, we'll pay
9 you.

10 So now I say, um, here's 4.3 percent that
11 I thought was worth it to me. I'd be willing to pay
12 it, but I don't have to, now that I've interacted with
13 the supplier. I go and I talk to the major league or
14 the regional Sports network or, let's say, the resale
15 carrier, to be more relevant to this proceeding, and
16 he's got -- well, you know, if you carry us, be able
17 to get Mets games.

18 Well, that's not quite a negotiation
19 there, but could be a regional Sports network, too.
20 If they're difficult, I might feel like I've got to
21 pony up a little more, and I might adjust that.

22 That comes when you interact in the
23 marketplace with the seller, but you start at this
24 point. This is very close and far removed from
25 viewing. I'm way down the road towards a deal,

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1 because I've kind of got my demand curve in mind here;
2 but where I get a surprise like I don't have to pay
3 for Religious/Devotional or maybe what I find is that
4 in my market two independent stations recently went
5 out of business because had too much debt, guys paid
6 too much for the station, had a poor sales force, went
7 out of business.

8 Got the Syndicators saying, ah, we got
9 products sitting on the shelf, ever green, we can't
10 sell in this market. Maybe they'll make a deal where
11 I can save some more money. If I save some more money
12 on Syndicated, well, maybe I can pay a little more for
13 bringing American Movie Classics that's going to give
14 me movies.

15 So that's the interaction of supply and
16 demand. This is where you start. Get into the
17 marketplace. You're going to find some surprises.
18 Syndicated might be cheaper. Sports and Movies might
19 cost a little more. Religious are going to pay me.

20 I can't take it from -- This is as far as
21 I can take it, but it's much further down the road.

22 Q So the value in that example might be
23 totally different from what the marketplace result
24 would be, the value the guy started out with. Is that
25 correct?

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1 A I expect that the marketplace result will
2 be different than this. I think that this is as close
3 a simulation of the marketplace as I can conceive of
4 or that I've seen anyone else conceive of. I think
5 that's all we can do.

6 You have a tough job, because you're not -
7 This isn't in the marketplace. This is as close as
8 I can get you.

9 Q Is the task that you ask the cable
10 operators to do and as you've explained it simply
11 dividing the value without knowing what the
12 marketplace prices would be from the seller among
13 these competing categories?

14 A I think, as I indicated in my testimony
15 in the '83 proceedings, that we would expect that
16 where the sellers had a variety of marketplaces in
17 which they could sell their products that I wouldn't
18 be surprised to see the price eventually, the
19 allocation, shift toward those program categories
20 where there were other supplies and away from ones in
21 which -- I just acknowledged that Religious might drop
22 from 4.3 to zero, where there was no other place to
23 sell it and, in fact, they're just eager to get on.

24 Q But is your survey results simply dividing
25 value among these competing program categories without

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1 relationship to anything that's going to happen in the
2 marketplace?

3 A I think we've gotten to one step removed
4 from the marketplace. I think we are a few steps
5 beyond what looking at viewing hours gives you. We're
6 close to the marketplace. In no way can I represent
7 that this is what would come out in the marketplace.

8 No, I don't think any of us can adequately
9 do that. I have cited instances, and I emphasize, I
10 think, to you, to take a look at the cable program
11 marketplace and get some idea of what happens and what
12 do they pay for.

13 One of the least watched channels on an
14 average rating basis is a regional Sports network,
15 because although it has some games that are great,
16 real value, baseball, basketball, on the channel, take
17 a look at their program lineup. A lot of the stuff
18 is really bad.

19 I've called it junk programming with them,
20 and they get upset. So maybe I shouldn't characterize
21 it that way, but, you know, it's mud wrestling and
22 tractor pulls and stuff you've never even heard of
23 that's in there.

24 Yet -- But there are a few things that
25 they watch, and they watch it intensely. Guess what

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1 one of the most expensive channels is where they pay
2 the most -- cable systems pay the most for a channel?
3 Regional Sports networks.

4 On an average twenty-four hour rating
5 basis, they're way down in the mud. When they've got
6 the Detroit Pistons on in the Detroit area, got the
7 Pistons on, Tigers on, they do fine; not a lot of
8 hours. That's what they want. They pay for it, and
9 they pay a lot for it.

10 So I really think there is a marketplace,
11 and I think when you look at that marketplace
12 carefully, I think you'll see that it's a lot more
13 consistent with this kind of profile than with a
14 viewing power's profile.

15 This is not magic, but I just think this
16 is closer to what you'll find in the marketplace.

17 MR. LANE: Could I take a break for a
18 minute?

19 CHAIRMAN AGUERO: Yes. Ten minute break.

20 (Whereupon, the proceeding recessed
21 briefly at 3:44 p.m. and resumed at 3:55 p.m.)

22 CHAIRMAN AGUERO: We'll go back on the
23 record. Mr. Lane, please.

24 BY MR. LANE:

25 Q Mr. Bortz, who formulated the types of

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1 programming included in Question 4 in the study?

2 A Well, two of the five categories were
3 added in response to the Tribunal's concern that all
4 only claimants were represented. The other five
5 categories were in the '83 study. I'm trying to call
6 back then how that was done.

7 I believe that there were a series of
8 discussions, looking at the Tribunal's record, looking
9 at the prior studies of BBD&O, looking at MPAA, and
10 trying to just have a representative set.

11 Q Do you consider these to match the Phase
12 I claimant categories before the Tribunal?

13 A Well, we believe that they matched -- It's
14 our understanding that they do match the claimant
15 categories. That's correct.

16 Q What basis do you have for that
17 understanding?

18 A Just discussions with counsel.

19 Q Have you ever ready any of the Tribunal's
20 decisions on category definitions for phases?

21 A I saw some material. I can't cite the
22 exact material that I have seen.

23 MR. LANE: I'm not sure whether this needs
24 an exhibit number, but this is an opinion of the
25 Tribunal from May 16, 1986. How do you want to handle

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1 it, Mr. Chairman?

2 CHAIRMAN AGUERO: We will take official
3 notice of the opinion.

4 MR. LANE: Thank you.

5 BY MR. LANE:

6 Q Have you seen this --

7 MR. GARRETT: Does this have an exhibit
8 number?

9 CHAIRMAN AGUERO: No.

10 MR. LANE: I just asked if they wanted to.

11 CHAIRMAN AGUERO: No. Official notice.
12 We don't need any --

13 MR. GARRETT: Just for clarity in the
14 record.

15 CHAIRMAN AGUERO: Do you want to give any?

16 COMMISSIONER ARGETSINGER: Well, we could
17 say the Advisory Opinion, May 16, 1986, CRT, and just
18 say it as that.

19 BY MR. LANE:

20 Q Mr. Bortz, have you seen the Advisory
21 Opinion of the CRT dated May 16, 1986 before today?

22 A I have seen this terminology. I couldn't
23 compare it word for word. I have seen something that
24 sounds very much like this. Whether it was embodied
25 in this document or some other document, I couldn't

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1 tell you.

2 Q Did you take that into account in
3 formulating the programming types that you listed for
4 Question 4(a) of your survey?

5 A Going back, first of all, the categories
6 that we formulated are quite similar to our '83 study
7 which, obviously, predates this. I don't recall the
8 exact sequence in which we looked at it, but there was
9 nothing in these definitions which caused us to change
10 those categories.

11 Q Could you -- One of the programming types
12 that you have is Syndicated Shows and Series, is it
13 not, for Question 4(a)?

14 A Yes, that's correct.

15 Q Could you tell me what the difference
16 between a Show and a Series is?

17 A Well, a Series, I think, is generally
18 regarded as a continuing Series cast of characters,
19 generally a fictional series of some sort, whether it
20 was Sitcom or Dramatic.

21 A Show would tend to not have quite that
22 level of continuity, although it could continue to
23 have, say, the same host. We didn't try and slice the
24 bread there.

25 Q You didn't refer, did you, as the Tribunal

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1 in its May 16th Advisory Opinion, to Syndicated Series
2 and Specials?

3 A We used Syndicated Shows and Series, which
4 is --

5 Q You didn't -- I'm sorry. There is no
6 reference in your list in Question 4 to Specials, was
7 there?

8 A No. Syndicated Shows and Series is what
9 is in ours.

10 Q Do you know, Mr. Bortz, that the program
11 suppliers represent both Movies and Syndicated Series
12 and Specials?

13 A That's my understanding.

14 Q So you have broken that category into two
15 program types, have you not, on your questionnaire?

16 A Well, we've broken -- We think Movies is
17 a clearly defined category, as is Syndicated Shows and
18 Series.

19 Q But for the Tribunal's purposes, it's a
20 single category, is it not?

21 A I'm not that acquainted with what the
22 Tribunal deliberations would be, but these are the two
23 categories.

24 Q Well, do you accept that program suppliers
25 do constitute both Movies and Syndicated Series and

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1 Specials?

2 A Yes.

3 Q Now is it your understanding that the
4 Local category is solely constituted of News and
5 Public Affairs?

6 A Yes. This is a difficult category to deal
7 with. We found both in the responses to Questions 2
8 in our '83 survey and such that this is the way it
9 tended to be characterized.

10 There are, say, a Local breakfast show of
11 some sort. Some are quite popular in an area. That
12 doesn't come under there, and yet it's produced by the
13 Local station. So that wouldn't be included here.

14 Q Are you aware that some News and Public
15 Affairs programs are Syndicated programs?

16 A Yes. I would say that's the case.

17 Q How would a person who, for example, was
18 thinking of CNN News -- Where would that person put
19 the answer with regard to CNN News, the valuation of
20 CNN News on this response to Question 4, in your
21 judgment?

22 A I can't say precisely. I can say that
23 that kind of confusion was not registered by our
24 respondents. There were cases where people were
25 uncertain of categories, and that was indicated in the

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1 Other response, which we made clear to the
2 interviewers should be written down.

3 Looking at that, that did not -- I don't
4 recall an instance of CNN News being written down
5 there.

6 Q You don't recall an instance of CNN News
7 being put in the News and Public Affairs type? Is
8 that what you're saying?

9 A I don't recall somebody -- I don't recall
10 that there are any questionnaires where somebody
11 responded CNN News. I think, had they, it would have
12 appeared under the Other category.

13 Q Well, my question is: It may not have
14 appeared in the Other category, because they all put
15 it under News and Public Affairs. Isn't that likely?

16 A I think that that's possible.

17 Q And yet under the Tribunal's definition,
18 that would be a Syndicated program and not in the
19 Local category, wouldn't it?

20 A I would have to leave that to those of you
21 who are more acquainted with the definitions of the
22 Tribunal.

23 Q Now where do you think, in response --
24 Particularly, let's go to -- Start off with Question
25 2 about the most popular programming. Now this one

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1 you didn't -- the interviewer did not read the list.
2 Is that correct?

3 A That's correct.

4 Q And if the respondent said, well, I really
5 like live wrestling shows, where would that go?

6 A I think that would have shown up in Other.

7 Q You think that would have shown up in
8 Other?

9 A Yes.

10 Q What basis do you have for that?

11 A Well, I refer you to page 17 of our report
12 where we have called out Other responses, and you see
13 something like Classic Films, which you could - It
14 isn't hard to imagine that that's Movies, but Classic
15 Films was written down by the interviewer. Game
16 shows, which are, by and large, Syndicated shows, was
17 written down by the interviewer.

18 What we did in our instructions to the
19 interviewer was to make it quite clear that, you know,
20 this is an unaided -- If it fits in the category, mark
21 the category. If it doesn't fit in the category,
22 write it down.

23 Q And to your opinion, none of them thought
24 that wrestling would fit in the Live Professional
25 Sports category?

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1 A I don't know that live wrestling was
2 mentioned by anyone. There is no evidence of it
3 having been mentioned. I can say that the Burke
4 interviewers would not have then classified -- taken
5 an answer, "live wresting," and instead put down
6 Sports. They would have written down live wrestling
7 in Other.

8 Q So is it your testimony that a person --
9 The only time that they circled No. 2 in response to
10 2(e) is the respondent says life professional sports?

11 A No. I think that they could say --

12 Q What if they said baseball?

13 A If they said baseball?

14 Q Yes. Where would they put that?

15 A First of all, I don't know there were any
16 responses like baseball. If they said baseball --

17 Q Do you know that there weren't, Mr. Bortz?

18 A What's that?

19 Q Do you know that there weren't?

20 A Our understanding is that the responses
21 fit into these categories, like Sports.

22 Q My question then is: If the answer -- Are
23 you stating that the interviewer only circled 2 if the
24 respondent said live professional or college sports,
25 in those terms?

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1 A I think if they had said professional
2 sports, it would have been circled. If they had said
3 NCAA football, I think it would have been circled.
4 I think there are instances where the inclusion is
5 obvious, and it would have been circled.

6 They did not have to respond with the
7 precise thing. These are categories. In our
8 instructions we said, if there was any doubt
9 whatsoever, put it in Other.

10 Q And you're saying that if they heard
11 wrestling, there would be doubt in their mind?

12 A Yes.

13 Q What would be the other --

14 A Because in my instructions to the
15 interviewer, wrestling was, in fact, an example; and
16 we pointed out that the taped wrestling shows are
17 Syndicated shows.

18 Q What did you say about live wrestling?

19 A If it just says wrestling, we said put it
20 down.

21 Q What about live wrestling shows?

22 A I don't think we discussed that
23 refinement, but basically, we attempted to address
24 these issues in the instructions to the interviewers.

25 Q What about auto racing?

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1 A I think auto racing --

2 Q Did you use that as an example in the
3 instructions?

4 A I did not use auto racing as an example.

5 Q What if the respondent had said auto
6 racing?

7 A It would have appeared in Other.

8 Q And why do you think that?

9 A Because it was not clearly -- We talked
10 about the fact that live professional and college
11 sports was in fact major sports.

12 Q And you don't consider auto racing a major
13 sport?

14 A I don't recall that we addressed auto
15 racing in the instructions to the interviewers.

16 Q Now what if a respondent was thinking of
17 auto racing or wrestling and just said sports? Where
18 would that answer have gone?

19 A I think it would have been marked Sports.

20 Q Are you aware that wrestling programs
21 could either go to Syndicated shows or Local under the
22 Tribunal's definition?

23 A That would be my understanding, yes.

24 Q How did you come to that understanding,
25 Mr. Bortz?

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1 A Well, I think that Syndicated -- Taped
2 wrestling was something that we discussed with counsel
3 and was discussed before.

4 Q What about auto racing? Did you discuss
5 that?

6 A I don't recall any discussions dealing
7 with auto racing.

8 Q If that were a sport -- If that were what
9 the respondent had in mind, where do you think that
10 they would have valued that, in what of the program
11 types that you've listed?

12 A I couldn't comment on what the respondent
13 might have had in mind. We put responses into the
14 categories only if they obviously fit into the
15 category.

16 Q Well, let's turn to Question 4 instead of
17 Question 2 now. If the respondent had auto racing in
18 mind, which of these categories do you think it was
19 most likely to have been put into?

20 A I couldn't speculate on that, Mr. Lane.

21 Q Do you know -- Do you have any idea what
22 any respondent understood by these various program
23 types?

24 A We had never had in '83, '86 or '89
25 instances where the respondent said we don't

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1 understand the categories. We do a lot of market
2 research and, believe me, if we have a set of
3 categories that don't fit comfortably within the group
4 of respondents' view of what we're asking, they'll say
5 we don't understand that category.

6 Q My question is: Did these categories fit
7 into the Tribunal's definition of Phase I program
8 categories?

9 A I believe they do. I think that at the
10 fringes there are going to be programs -- You've
11 certainly cited programs that are good examples of
12 that, and I think at the fringes, quite clearly, there
13 is some fuzziness here.

14 We can't provide them with an all
15 inclusive list, because I think we would introduce
16 other problems in the survey. So I'll certainly say
17 that there are instances where that's the case. I
18 think it's also reasonable to state that that has to
19 have very little effect on total valuation here.

20 We're talking about -- The categories
21 you've brought up are categories that, in my
22 experience and work in the business, have not been
23 viewed as key categories of cable programming. So,
24 certainly, there will be areas where it will fall over
25 from one category to another.

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1 Q Is it your opinion that, of News and
2 Public Affairs programs, CNN is not an important News
3 and Public Affairs program on distant signals?

4 A As I said before, if CNN Headline was
5 mentioned, it would have been written down as Other.
6 It apparently did not come up.

7 Q Well, what about in response to Question
8 4? What if the respondent was thinking of CNN? What
9 indeed if that was the only news program on a distant
10 signal?

11 A That in fact could have been classified
12 in one or the other, and I would have no knowledge of
13 that.

14 Q So you don't know whether or not that
15 would have been in News in the respondent's mind?

16 A No. There's a fuzziness at the
17 boundaries.

18 Q Do you think it's possible it could have
19 gone into something else?

20 A We're talking about responses, and we're
21 talking about what's in a respondent's mind. I have
22 no idea of knowing what's in the respondent's mind.

23 Q Well, how do we know then that all
24 respondents had the same definition for each program
25 type?

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1 A We don't know that. What we do know is,
2 with the long history now of this survey, with the
3 consistency of results over time, with the use of the
4 unaided question 2 to, in a sense, validate our
5 categories, that these are categories that the
6 executives in the cable industry that we deal with are
7 comfortable with. It fits.

8 COMMISSIONER ARGETSINGER: Mr. Lane, if
9 I may ask a question.

10 Mr. Bortz, was it clear in the
11 respondent's mind that you were asking about distant
12 carriage?

13 THE WITNESS: Yes. We repeated that. We
14 listed the signals. We started off saying we're
15 talking about distant signals, the use of the distant
16 signals you carry, the call letters. Is that right.
17 Do we have to change it?

18 COMMISSIONER ARGETSINGER: Distant signals
19 of broadcast stations.

20 THE WITNESS: Distant signals of broadcast
21 stations. It was very clear. There were, in some
22 instances -- I mean, you can do everything possible,
23 and you're going to have a few respondents who will
24 still be confused.

25 COMMISSIONER ARGETSINGER: I'm a little

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1 confused about the CNN reference. CNN is not a
2 distant broadcast.

3 THE WITNESS: Oh, I think what Mr. Lane
4 is referring to is that CNN licenses as a syndication
5 to broadcast stations the use of its News. So there
6 are a number of broadcast stations who will carry CNN
7 News, say, late at night.

8 In that case, it's broadcast.

9 COMMISSIONER ARGETSINGER: Well, we've
10 cleared that up. Thank you.

11 BY MR. LANE:

12 Q Mr. Bortz, do you think any of the
13 respondents are familiar with the CRT's program
14 definitions?

15 A I couldn't answer that question. If the
16 line of CRT is very well known, then Washington is the
17 only town.

18 Q In your judgment, what is it -- is it of
19 little importance or great importance for the program
20 types that you have listed to match the tribunal's
21 definition?

22 A I think as I mentioned before, we believe
23 that it matches the claimant's, that there can be some
24 uncertainty at the fringes, and therefore, that
25 uncertainty is inherent in any technique like this.

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1 But we don't think it is of any significance.

2 Q So you don't think it's important? It's
3 of little importance, is that what you're saying?

4 A I think you're misstating what I said.
5 I said I think that these categories do match the
6 claimant categories, that there can be some
7 differences only at the fringes, and in my view would
8 not have a significant impact on the results of the
9 study.

10 Q Well, just sticking with program suppliers
11 category, you have split the category in half, have
12 you not?

13 A Well, I think that we wanted to have
14 something here that fits the market's perception. And
15 I don't believe that although you, because of common
16 ownership, or whatever your reasons are, are filing
17 as a single claimant. The natural category is movies.
18 And a natural category is syndicated. And I think it
19 would be artificial for us to force people into movies
20 and syndicated. And I am only speculating, it is my
21 view that probably breaking you into two categories
22 certainly isn't going to be harmful to the way you
23 come out in the circuit.

24 Q Well, do people think of professional
25 sports and college sports? Aren't they two separate

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1 program types, just as movies and syndicated series
2 are two separate types?

3 A No. In my experience in the sports
4 marketplace, they are viewed as directly competing
5 with each other by people in the television business
6 and in the cable business. College and pro sports
7 just rolls off the tongue. That's a very natural
8 category. Sports is the category. It's not broken
9 into those segments, not broken out as NBA basketball.
10 I think sports is a natural category. Certainly our
11 Sports On Television report to the NBA is another
12 indication of that. It has never been raised, that,
13 "What kind of sports?" And that --

14 MR. AGUERO: If I am a cable manager, and
15 I have a phone call, and if I said "Well, baseball,
16 hockey, and basketball. And then movies and serials.
17 And also, by the way, college sports." This is the
18 right answer?

19 THE WITNESS: I think first of all, if we
20 began to do that, break it -- if I understand the
21 question, break it into the different elements --

22 MR. AGUERO: No, when you say sports, I
23 said, well, basketball, baseball, and hockey. And
24 then, well, movies, and television serials, the
25 syndicated serials, and then also we like religious

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17 And also, by the way, college sports." Is that the
18 right answer?

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20 begin to do that, break it -- if I understand the
21 question, break it into the different elements --

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23 said, well, basketball, baseball, and hockey. And
24 then, well, movies, and television serials, and
25 syndicated serials, and then also you like release for

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1 programs or the devotionals, sometimes.

2 THE WITNESS: Yes.

3 MR. AGUERO: Also, well, on college
4 sports, too.

5 THE WITNESS: Yes. Basketball, baseball,
6 hockey and college sports would be marked as sports.

7 MR. AGUERO: But I can't name the sport?

8 THE WITNESS: You could name the sport.

9 MR. AGUERO: Like basketball, baseball
10 -- ?

11 THE WITNESS: If they did that, it would
12 be my understanding that that is the case. I'm not
13 aware that that is the case. I think that
14 overwhelmingly and --

15 MR. AGUERO: Automatically it is
16 professional sports and college sports?

17 THE WITNESS: Well, Mr. Troutman, who is
18 vice president in our firm listed into the interviews,
19 a number of initial interviews. And the answers were
20 sports. He did not hear any where they broke it out.
21 He might have. But I couldn't tell you that.

22 When we asked Burke about that, my
23 recollection was that it was sports that was
24 mentioned.

25 BY MR. LANE:

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2 THE WITNESS: Yes.

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4 sports, too.

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7 MR. AGUERO: But I can't name the sport?

8 THE WITNESS: You could name the sport.

9 MR. AGUERO: Like basketball, baseball
10 -- ?

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20 sports. He did not hear any where they broke it out.
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25 BY MR. LANE:

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1 Q That's just on question two, is that
2 right?

3 A No. This was a general question. I mean,
4 this applied to their -- there was nothing that --
5 that was unaided. And three also was also unaided,
6 where sports could be mentioned as sports.

7 Once we left the first part of three, we
8 were aided, and then we were specifying the category
9 of sports. So question four, of course those
10 categories were directly specified, and not left open
11 to interpretation. When we look at this chart, the
12 numbers for live professional and college sports are
13 in response to a specific question about live
14 professional college sports.

15 So all of this discussion about the
16 uncertainty of what was meant only affects questions
17 two and three, popularity, and use in advertising and
18 promotion. Question four, all respondents were
19 responding to the identical categories, and there
20 would be no differences such as you have tried to
21 paint.

22 Q Now, is it your testimony that the -- like
23 the wrestling show, and the auto racing, and CNN, and
24 those type programs are not important in the overall
25 results? They don't affect the percentages? They

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1 have been put in the correct category in each case?
2 It would not affect the percentages?

3 A It is my opinion that the programming at
4 the fringes, when we say live profession, college
5 sports, -- live, first of all, there is no confusion
6 then about wrestling. That's not in there. When we
7 say news and public affairs, or a syndicated news
8 show, that those programs at the fringes would not
9 significantly affect these numbers. That is my
10 opinion.

11 Q And it is your -- is it your opinion that
12 live professional wrestling isn't a live professional
13 sport?

14 A Live professional wrestling?

15 Q Wrestling.

16 A Could certainly be viewed in -- by a
17 respondent as that. I don't know.

18 Q It could have been included in -- ?

19 A I don't think it would have had much
20 effect. I don't believe it would have much effect one
21 way or another.

22 Q And your answer is the same for the CNN
23 news program, is it not, for the news and public
24 affairs category?

25 A That is correct.

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1 Q Have you --

2 MR. AGUERO: Can we have one minute
3 recess? Mr. Lane, would you please?

4 BY MR. LANE:

5 Q Have you -- in the other category, that
6 was the one where the people gave names of programs,
7 for example, is that correct?

8 A That is correct.

9 Q Now, one of the responses in the other
10 category which I think you identified was "Cheers,"
11 is it not?

12 A What are you referring to? What page?

13 Q I know it's in one of your footnotes, but
14 I don't recall which one. Well, let's take "Arsenio."
15 You testified about that this morning, did you not?

16 A Yes.

17 Q Now, you reclassified that to a syndicated
18 program, did you not?

19 A That is correct.

20 Q "Cheers," by the way, is shown on page 17,
21 footnote two?

22 A Yes. The answer there was prime time
23 show, for example, "Arsenio," "Cheers," we have quoted
24 that.

25 Q Is "Arsenio" a prime time show, as you

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1 understand prime time?

2 A It is not a prime time show as I
3 understand prime time. Certainly this respondent
4 viewed it as one.

5 Q And this footnote suggests that there was
6 in people's mind -- at least in the ones that you
7 recategorized, most of the problem was with the
8 syndicated shows and series, correct?

9 A Well, certainly, let's see, we had, three,
10 five, six, seven, eight. I would characterize that
11 as eight of the 11, not eight of the 22, if you're
12 going to look at --

13 Q But we don't know what the other 11 are,
14 do we? Of the ones that you have listed, most of them
15 were indicated --

16 A That we did not recategorize, or not
17 listed here. The fringe programming that you tend to
18 refer to, I don't use the word "likely." I think the
19 tribunal, if they have questions about the fringe
20 programming, should take a look at the rights fees
21 commanded by auto racing or live wrestling, versus the
22 rights fees paid in the marketplace for major league
23 baseball, NBA basketball, and so forth.

24 So, I think it's appropriate that we have
25 problems here at the fringes, but I don't use that as

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1 a term of derision. It's fringe because in the
2 marketplace it's not a program -- programming that's
3 highly valued. And so, if it falls on one side or
4 another I don't believe it shifts this, and I think
5 that you can have a marketplace reference by just
6 saying where there is a market for this. What does
7 it command?

8 Q Do you think "Cheers" is a fringe
9 syndicated program?

10 A No.

11 Q But yet someone had a confusion about how
12 to type "Cheers" under your classification, is that
13 right?

14 A Yes. Yes. I am --

15 Q Do you think game shows -- ?

16 MR. CASSLER: Excuse me. Did you have --
17 did you finish your answer?

18 THE WITNESS: No. I would like to
19 complete. I was going to say that given the fact that
20 we had 187 survey respondents, the fact that we had
21 just this handful to reclassify, some which were, you
22 know, not hard to reclassify, like "Cheers," to me is
23 just one more indicator of the solidity of the program
24 categories that we use.

25 BY MR. LANE:

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1 Q Well, 22 out of 187 is more than ten
2 percent, is it not?

3 A Twenty two responses, but there are more
4 than one response. I can't tell you what the total
5 number of responses in the 187 were, but a lot more
6 than 187. Okay, this is just the other category, was
7 the 22 responses, but there were more than one
8 response, typically, to the question.

9 Q Now, are game shows, fringe shows, in your
10 definition of syndicated programs?

11 A Fringe shows?

12 Q Yes, in the way that you were just talking
13 to the tribunal about auto racing and wrestling?

14 A We reclassified -- we didn't reclassify
15 something unless we felt it fit clearly into a
16 category. We believe that game shows overwhelmingly
17 would fit into syndicated. That's not to say that
18 some local station has put together its own local game
19 show. That -- a local station with a local game show
20 I think would be fringe, because if you add that up
21 across the country, it would be minimal.

22 Q Do you think family sitcoms is a fringe
23 type within the syndicated program type?

24 A Mr. Lane, anything that we reclassified
25 we felt clearly felt in the category. There were

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1 responses -- we recategorized 11 of 22 responses. The
2 other 11 we felt it was not clear where to put them.
3 But these 11 we felt it was clear.

4 Q But this indicates, does it not, that
5 there was confusion in the syndicated program category
6 by respondents?

7 A I believe just the opposite. The very
8 small number of these instances in 187 questionnaires
9 indicates that there was overwhelming understanding
10 of the category.

11 Q There were no -- were there any -- was
12 there any confusion, or anything in the "other" that
13 you reclassified to sports?

14 A Is there -- if you could repeat?

15 Q Were there any answers in the other
16 categories that you reclassified to sports?

17 A Nothing was reclassified unless it is
18 listed here.

19 Q So that, as compared to sports, where
20 there were zero, and syndicated, where there were
21 eight, did you say? There is a difference there, is
22 there not?

23 A Well, there is a difference between zero
24 and a finite small number, but I think you can fairly
25 categorize that in all cases there was virtually no

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1 uncertainty.

2 Q I'm going to turn to the advertising
3 question. At the bottom of page 18 you indicate that
4 35 percent of cable systems featured non-network
5 programming from distant signals in their '89
6 advertising promotional efforts, correct?

7 A That is correct.

8 Q And that means, on the other hand, that
9 two thirds, roughly, of the cable systems do not use
10 advertising at all, from distant signals?

11 A Do not use non-network programming in
12 their advertising, that's right.

13 Q How important do you think advertising of
14 distant signal programming to the entire cable
15 universe is when two thirds of the systems do not use
16 it?

17 A I think it is quite important, because
18 there are a number of systems that really don't do
19 that type of advertising and promotion. We wouldn't
20 have expected 100 percent of the systems to be using
21 some other form of programming in advertising
22 promotions. This just said distant signal.

23 We don't have information on whether they use
24 something else, other programming, like ESPN in their
25 advertising and promotion. I can't compare that.

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1 Q But just with the distant signals, two
2 thirds of the systems you surveyed, and according to
3 you that can be projected to all Form 3 systems, am
4 I right?

5 A That is correct.

6 Q So two thirds of the cable systems, Form
7 3 cable systems, don't use distant signal programming
8 at all in their advertising, do they?

9 A That is correct. That's what this
10 indicates in our sample. In our sample. But, well
11 --

12 Q Are you saying your sample is not
13 projectable to the entire universe?

14 A This -- on these questions, as we have
15 described in the report, the projection is not worldly
16 based, this is on a total system basis. So here, what
17 we have is this sample of 187 systems. And to project
18 it, what we did -- we do have to project it, but let
19 me caution you that you don't project it, weight it
20 in the same way in coming up to the universe.

21 You have to weight it just proportionate
22 to the number of systems. I believe that our answer
23 -- I would have to say that our answer here was
24 weighted up by the number of systems in the survey,
25 so it's not 35 percent of the 187. This is a weighted

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1 response.

2 Q Does that mean that roughly 65 percent --
3 you are projecting that 65 percent of all Form 3
4 systems do not use distant signal programming?

5 A Yes. That is correct.

6 Q And now, on the next page, when -- that
7 is page 19, when we look at those numbers, 74 percent,
8 15 percent, and whatnot, that is 74 percent of 35
9 percent, is it not?

10 A Seventy four percent of the 35 percent of
11 systems, yes. Now we are talking about the 35 percent
12 who use it, obviously, and those are the only ones
13 that proceeded. If you recall, there was what we call
14 a skit sequence in the questionnaire. If you didn't
15 use it, you went on to the next question.

16 Q So that, the 74 percent has to be
17 multiplied by 35 percent to get the total percent --
18 percentage of the total systems that would use, for
19 example, live professional sports, or would have
20 responded in an unaided way to this question?

21 A Yes. The way you qualified it, in an
22 unaided way. And 90 percent --

23 Q Ninety percent in a combined way?

24 A That is correct.

25 Q But that would be 90 percent of 35

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1 percent, right?

2 A That is correct.

3 Q And do you recall in the '83 study that
4 the percentage of systems who advertised with distant
5 signal programming was 40 percent?

6 A I don't recall the numbers in the '83
7 survey.

8 Q If I can just show you page 12 of your
9 Joint Sports Exhibit Number 1 from the '83 proceeding,
10 and ask you if it does not indicate that more than 40
11 percent featured distant signal programming in their
12 advertising?

13 A That is correct. That would compare to
14 the 35 percent that we got this year.

15 Q So there is a decline in the use of
16 advertising of distant signal programming based on
17 your survey results from '83 to '89, is that correct?

18 A Given that 35 percent and 40 percent are
19 not far apart, I would be unwilling to state that
20 there was a decline. I am not sure that we would find
21 that there was a statistically significant difference
22 in the answer to that. You would have to run a
23 statistical test.

24 Q Are cable operators offered advertising
25 incentives to advertising certain stations by either

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1 common carriers, or the stations themselves?

2 A You're talking only about distant signals?

3 Q Yes. I am.

4 A I'm not sure whether the common carriers
5 or the resale carriers have incentive or cooperative
6 programs. Most cable networks do, and I suspect they
7 might, but I could not answer with any certainty.

8 Q Do you know whether the advertising to
9 which this answer refers was advertising supply by a
10 common carrier, or the television super station
11 itself, rather than -- ?

12 A This would be -- in either way, I am
13 acquainted with WGN, where they have taken an active
14 role in promoting the carriage of WGN through the
15 resale carrier, and they link up on that. So, in some
16 cases it could be both, in some cases one, in some
17 cases the other.

18 Q In discussing the results of the study on
19 page 11, for example, you referred to the relative
20 value -- do you not, do you see that?

21 A Yes. I do.

22 Q What -- would you define that for us?

23 A Well, we deliberately used a general
24 terminology here, because we are looking at the BBDO
25 surveys from '79 and '80, ELRA, and '83, BBC, my

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1 former company in '83, and our Bortz and Company
2 survey. In each of those, the categories were
3 essentially the same, the wording is a little
4 different. So it's just a general characterization,
5 and indeed, there are differences in the way the
6 question was formulated.

7 Q Are you offering the results here to show
8 ranking of the program types you have listed, or in
9 terms of specific valuation numbers?

10 A Well, as I have indicated, I think these
11 most accurately represent the value of these program
12 categories. We have indicated, number one, the
13 confidence integrals at the 95 percent level that can
14 be applied, so that we don't even assert that the
15 projection to the universe is any more accurate than
16 this number plus or minus the confidence integral, so
17 we are giving ranges.

18 We do feel that within those ranges that
19 are specified, we think that the true value, if anyone
20 could know the true value, lies somewhere within those
21 ranges.

22 Q Well, on page two of your testimony, for
23 example, you indicate that the -- and it's at the
24 bottom of the page in number two, that the questions
25 confirm operators ranking. Do you see that?

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1 A Yes.

2 Q Now, is that what you were attempting to
3 confirm? Was that the point of the study, ranking,
4 or was it percentages?

5 A Well, the purpose of question four is
6 clearly percentages. And when you apply the
7 confidence integrals, for example movies and sports
8 are so close in their numbers that their confidence
9 integrals will overlap somewhat. I believe that's the
10 case. If not, they're awfully close to overlapping.

11 So, I think it's inappropriate to say that
12 ranking, as we have made very explicit, that we think
13 the values lie in a certain range, and I would say
14 that the clear conclusion here is that movies and
15 sports are about the same level. Syndication is
16 clearly at a lower level, and so forth.

17 Q Now, in the 1983 study, do you know
18 whether the integral -- confidence integral between
19 movies and sports overlap?

20 A I would have to refer to the report. I
21 wouldn't tell you. And, as I indicated, I can't tell
22 you on this one without referring to the numbers.

23 Q If you would look on page 28, please?
24 Twenty eight is the page, I believe, is it not, that
25 has -- ?

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1 A Yes. Well, they would clearly, live
2 professional and college sports, and movies would
3 overlap in 1989.

4 Q Now, looking at -- I am showing you 1983
5 Joint Sports Exhibit 1 at page 23, does that have the
6 same program valuation that you just looked at for
7 '89?

8 A Well, it has somewhat different numbers,
9 and confidence integrals are roughly of the same
10 magnitude. They are close to overlapping, but don't
11 literally overlap at the 95 percent confidence level.

12 Q So, in 1983, there was no overlap, but
13 there is in 1989. Is that correct?

14 A That's correct, yes.

15 Q Did you determine whether the percentage
16 -- percent allocation for sports went up or down
17 between 1983 and 1989, as is shown in your survey?

18 A Well, what we have here is a specific
19 number that we determined, the number is somewhat
20 different in the other survey. This is 1989, and that
21 is 1983. So, up or down, we have got different signal
22 carriers. We attempted here to present the value for
23 1989.

24 Q And those values are shown, are they not,
25 on page 11 of your testimony?

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1 A Page 11 summarizes values that were
2 obtained in the various surveys, yes.

3 Q And in 1983 for live professional and
4 college sports, it was 36.1, in 1989 it was 34.2,
5 correct?

6 A That is correct.

7 Q And movies in the -- on the same table is
8 shown as going from 30.2 to 31.2, is that correct?

9 A Right. Given the fact that these results
10 are so consistent over time, I think you would have
11 to do statistical tests to say whether our results are
12 different or not. For example, the 34.2 for '89 has
13 a 95 percent confidence level plus or minus 2.5
14 percent. At the upper end of that confidence level,
15 it would include the 36.1.

16 And I would have to defer to the
17 statisticians to tell you whether or not that
18 indicated a change. I don't think you can just read
19 the mean here, the weighted mean, and draw a
20 conclusion.

21 Q There are ranges?

22 A You have asked this before, and I want to
23 emphasize to the tribunal that, take these ranges and
24 apply them to the means. I mean, don't take this
25 literally without saying, "There is some uncertainty,"

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1 for room at the fringes, whatever, but sampling
2 uncertainty.

3 Take the ranges, and the ranges is the
4 fairer delineation of where we think the true value
5 lies.

6 Q You refer, do you not, on page 11 to the
7 strikingly consistent results in the middle of the
8 page as shown by the table.

9 A Yes.

10 Q And, is this based on any statistical
11 evaluation of those results?

12 A No. That's a descriptive response of
13 surveys with somewhat different methodologies,
14 different sampling approaches, that repeatedly tell
15 us that this is the way operators value. I think the
16 consistency is striking, even without doing the
17 statistical analysis.

18 Q Is it your view that, for example, movies
19 with a high number of 43 in 1979 and the low number
20 of 25 in 1983 is striking consistent? Those two
21 numbers striking consistent in your judgment?

22 A I think they are very consistent. Not as
23 striking as sports. There has been, I think, bigger
24 changes in the movie universe. The decade of the
25 '80's saw the introduction of video cassette records,

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1 video rental stores, that sort of thing. There could
2 be some bouncing around there. The cable operators
3 might be varying it differently.

4 Again, if we take a look, though, at our
5 '83 and '89 study, we see there something I would
6 characterize as striking consistency.

7 Q But when you refer to strikingly
8 consistent on this page, you were referring to this
9 whole table, were you not?

10 A I think strikingly consistent is as
11 adequate a description of the whole table -- if we
12 begin to look at it microscopically, I would say, for
13 sports, striking consistent across all the years, for
14 movies, striking consistent over the period from '83
15 to '89. And we cite the 1990 study on page 12 that
16 shows about the same number. So, I would say that
17 there's a strikingly consistent --

18 Q What about the '86 study? '83, '86, and
19 '89?

20 A Yes. '86, the '83 --

21 Q For movies -- ?

22 A The '83 hit at about 25 percent. The '83
23 study hit at about 25 percent. And we're talking
24 about two -- one at 30 percent, one at 31. I think
25 that that's very very consistent. There's no reason

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1 why it has to be the same. We're measuring value in
2 '83, and the '83 study's value in '89, and the '89
3 study's -- but the fact that there is this consistency
4 I think further validates the sampling process and a
5 number of the other research issues that would be a
6 legitimate concern.

7 Q Do you think that a syndicated series with
8 a low of 10.6 and a high of 18.6 is strikingly
9 consistent?

10 A Not if I extend it there. Again, I would
11 refer to the work that we have done, where you have
12 got the greatest comparability in the questionnaires.
13 We're talking about BBC in '83 and Bortz and Company
14 in '89. And I find the 18.6 and 16.9 to be confirming
15 of the stability of these results, which is again, a
16 concern that was expressed by the tribunal.

17 I begin to run out of moisture here -- the
18 tribunal in the '83 study, because we didn't have as
19 long a track record in the '79 and the '80 studies
20 were done with a different methodology. But looking
21 at '83 and '89, I would say, yes, very consistent.

22 Q What about news and public affairs with
23 a low of 6.2 and almost double in not surprisingly the
24 ELRA study, supported by NAB to 13.3?

25 MR. STEWART: Objection. I object to the
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1 characterization of the ELRA study in questioning this
2 witness.

3 MR. LANE: It wasn't supported by the NAB?

4 MR. STEWART: Your editorial comment there
5 was not sur --

6 MR. AGUERO: He cannot hear your voice.

7 MR. STEWART: I object to Mr. Lane's
8 characterizing the results of the ELRA study as not
9 surprisingly higher than the NAB category of
10 programming. There are reasons for that. We can get
11 into it. But I object to his characterization in
12 questioning this witness.

13 MR. ARGETSINGER: Mr. Lane, do you want
14 to help us along here?

15 MR. LANE: I withdraw the
16 characterization. How's that?

17 MR. STEWART: That would be fine.

18 THE WITNESS: Is there a question pending?

19 BY MR. LANE:

20 Q Yes. Do you think it is strikingly
21 similar, between 6.2 in one study and double that --
22 over double that, 13.3 in another study?

23 A No. And I think BBC in '83 and Bortz and
24 Company in '89, which is where you look most to see
25 that consistency is there.

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1 Q What about PBS, where you go from 7.0 in
2 -- roughly to about one fifth of that at 1.3?

3 A Clearly not strikingly consistent. Not
4 even strikingly consistent between our 1983 and '89,
5 and I think it shows it is one of the flags that
6 indicated to us that, whoahh, something seems to be
7 amiss. Maybe we are not representative in '89, and
8 I have indicated to you we were. So, it is not
9 consistent, and this morning we explored why it was
10 not.

11 Q One of the things, the way that you
12 calculated the PBS study, the PBS result was that you,
13 as I understand it -- why don't you just tell me how
14 you did it? That way I won't have to characterize it,
15 how you did it.

16 A Well, the PBS number was calculated the
17 same way that every other numbers were. The only
18 thing that distinguishes PBS from the other -- the
19 five main other categories, other than Canadian, is
20 that there were a number of systems, 80 percent of the
21 systems, on which PBS station was not carried. And
22 those systems evaluation, they were not asked PBS, and
23 the evaluation was put in as a zero, appropriately.
24 So that is different.

25 Then the weighting, back up through the

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1 stratification is the same as for any of the other
2 categories.

3 Q So, the number of systems who responded
4 was a factor in the result for any party, is that
5 right?

6 A No. It's only the two categories where
7 the question was not asked of all respondents. That
8 the response rate of the survey would have an effect.
9 It's only on the PBS and Canadian categories that this
10 had a effect. All respondents answered all the other
11 categories. And so that issue doesn't arise.

12 Q Are you saying that every respondent gave
13 a percentage for every category other than the ones
14 that you didn't ask for?

15 A Or gave a zero in some cases. That could
16 happen, and I believe did happen. But they gave it.
17 We didn't assign it by not asking it.

18 Q Now, on page eight you state that the PBS
19 -- if you had just weighted, if you had just measured
20 the systems who answered, gave PBS 9.9, is that
21 correct?

22 A Yes.

23 Q I would like to show you, again 1983,
24 Joint Sports Exhibit 1, and ask you for the comparable
25 number from the 1983 study?

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1 A The evaluation there was 12, let's see,
2 yes. for those systems who actually imported a Public
3 Television Station, the evaluation was 12.7 percent.

4 Q So, that was a reduction from the '89
5 study? And just the systems who had PBS station for
6 the valuation they gave to PBS programs, is it not?

7 A That appears to be the case, yes.
8 However, again, let me withdraw that comment, because
9 without doing a statistical test, and I wouldn't have
10 any idea the confidence interval when we apply it to
11 a small sample of PBS. We're talking about only 20
12 percent of the systems. And although in the one case
13 it was about 10 percent, here it was 12.7. I can't
14 assert statistically that there is a difference there.
15 There would have to be statistical tests run in order
16 to make such an assertion.

17 MR. AGUERO: Mr. Lane, I think it's time
18 for us to go on for five more minutes. Then we will
19 continue tomorrow.

20 MR. LANE: I don't have five more minutes.
21 I mean, I have more than five more minutes.

22 MR. AGUERO: How much more? How much
23 more?

24 MR. LANE: I hope I'm going to be like
25 John Stewart, and if you give me a break, I can just

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1 come in and either say no questions, or very few
2 questions.

3 MR. ARGESINGER: Would you like to go for
4 another ten minutes, or five minutes?

5 MR. LANE: Whatever you want is fine with
6 me.

7 MR. AGUERO: Do you want to break now and
8 come back and tell us how many more minutes you have,
9 or what do you think?

10 MR. LANE: I'll do whatever you want, Mr.
11 Chairman, really.

12 MR. AGUERO: Five minute recess, and then
13 we return at 5:00. And from then on, if you tell me
14 you have one hour more, two hours, or three hours,
15 then we will decide.

16 MR. ARGESINGER: Or we could go on for
17 five minutes and get to a convenient place, and come
18 back.

19 MR. AGUERO: Okay, fine.

20 MR. ARGESINGER: Which would be better
21 for you, Mr. Lane, to go on for five minutes and break
22 at a convenient place, or -- ?

23 MR. LANE: They're all convenient for me.
24 If they are to you, I'm at your mercy.

25 MR. ARGESINGER: We just try to

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1 accommodate everybody here.

2 MR. AGUERO: All right. We don't have any
3 recess. We want to finish at 5:00. Five more
4 minutes.

5 MR. LANE: All right.

6 BY MR. LANE:

7 Q Why don't we turn to confidence integrals
8 on page 28 and 29? Could we just turn to page 29
9 first, Mr. Bortz?

10 A Yes?

11 Q Do you have that? Now, do you see in
12 devotional and religious, that under combined aided
13 and unaided, that the percent allocation is 4.0?

14 A Yes. I do.

15 Q And you see that the confidence integral
16 is 7.9, is it not?

17 A Yes. It is.

18 Q Now, could you tell me what that means on
19 the minus side?

20 A I already did. This confidence integral
21 was calculated using normal probability distributions.
22 Now, clearly devotional/religious is not going to be
23 valued at below zero. So there would be other ways
24 of specifying integrals using non-normal statistics.
25 It would be inconsistent with the others, and that,

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1 Dr. Bardwell felt that this was still representative.

2 Essentially, I think what you have to say
3 is realized realistically it is not below zero, and
4 it could go to 11.9. But, you know, there is an issue
5 there of using non-normal statistics that was a
6 refinement that we did not pursue.

7 Q And down in the most important distant
8 signal programming, you see for news and public
9 affairs, and also other, that the confidence integral
10 is greater than the mean, or the percent allocation
11 as you call it, correct?

12 A Yes. There are wide confidence integrals,
13 because these, as I indicated, were weighted in a
14 different way than the stratifying sample itself was
15 selected. And that does not provide us with the kind
16 of accuracy that we had.

17 We designed the survey primarily to
18 provide narrow confidence integrals, high confidence
19 in the numbers for question four. These other
20 supporting questions do have much more uncertainty
21 attached to them.

22 Q And if we flip back to page 28, we see the
23 same situation, do we not in the distant signal
24 programming popularity for PBS, devotional, and
25 Canadian, that is the integral is larger than the

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1 mean?

2 A That is correct.

3 MR. LANE: That was sort of a two minute,
4 get you close to 5:00, end with a subject, and hope
5 that we can start tomorrow and wrap it up very
6 quickly. Is that okay.

7 MR. AGUERO: All right. We will reconvene
8 tomorrow morning at 10:00. And with MPAA and Mr.
9 Bortz. Off the record now.

10 (Whereupon, hearing in the above entitled
11 matter was recessed at 4:59 p.m.)
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C E R T I F I C A T E

This is to certify that the foregoing transcript
in the matter of: COPYRIGHT ROYALTY TRIBUNAL - 1989 CABLE
ROYALTY DISTRIBUTION PROCEEDING
(DOCKET NO. CRT 91-2-89CD)

Before: MARIO F. AGUERO, CHAIRMAN

Date: SEPTEMBER 24, 1991

Place: COPYRIGHT ROYALTY TRIBUNAL
1825 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to type-
writing.


MILES ANDERSON

NEAL R. GROSS
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WASHINGTON, D.C. 20005

***PBS DISTANT CARRIAGE
JSC SURVEY COMPARED
TO ALL FORM 3 SYSTEMS***

	JSC STUDY <u>NO. SYSTEMS</u>	89-2 FORM 3 <u>NO. SYSTEMS</u>
W/ DISTANT PBS SIGNAL	27	435
TOTAL	187	2032
AVERAGE	14.4%	21.4%

SOURCES; JSC EXHIBIT 1, p. 8; CABLE DATA CORP.

**PERCENTAGE OF FORM 3 CABLE SYSTEMS
BY MARKET TYPE IN JSC SURVEY COMPARED
TO ALL FORM 3 SYSTEMS IN 1988 AND 1989**

MARKET TYPE	JSC STUDY SYSTEMS	%	88-2 FORM 3 SYSTEMS	%	89-2 FORM 3 SYSTEMS	%
TOP 50	107	57.22%	827	43.19%	847	41.68%
2D 50	30	16.04%	281	14.67%	302	14.86%
SMALLER	41	21.93%	536	27.99%	597	29.38%
OUTSIDE	9	4.81%	271	14.15%	286	14.07%
TOTAL	187		1915		2032	

MARKET TYPE	JSC STUDY SUBSCRIBERS	%	88-2 FORM 3 SUBSCRIBERS	%	89-2 FORM 3 SUBSCRIBERS	%
TOP 50	6,010,576	68.29%	22,150,108	57.76%	23,910,004	58.83%
2D 50	1,593,370	18.10%	6,221,238	16.22%	6,418,858	15.79%
SMALLER	1,149,842	13.06%	7,954,794	20.74%	8,426,388	20.73%
OUTSIDE	47,214	0.54%	2,023,491	5.28%	1,884,654	4.64%
TOTAL	8,801,002		38,349,631		40,639,904	

SOURCE: CABLE DATA CORP.

**PERCENTAGE OF DISTANT FORM 3 CABLE
SUBSCRIBERS INCIDENTS ACCOUNTED FOR
BY STATIONS IN JSC SURVEY (1989-2)**

INDEPENDENT STATIONS	93.541%
NETWORK AFFILIATES	48.404%
EDUCATIONAL STATIONS	49.997%

SOURCE: CABLE DATA CORP.

9-24-91

**NUMBER OF U.S. TELEVISION STATIONS
CARRIED AS FORM 3 FULL TIME
DISTANT SIGNALS, 1989-2**

	<u>NO. ACTUALLY CARRIED</u>	<u>NO. IN JSC SURVEY</u>	<u>%</u>
INDEPENDENT	219	56	25.57%
AFFILIATES	395	74	18.73%
EDUCATIONAL	<u>130</u>	<u>20</u>	<u>15.38%</u>
TOTAL	744	150	20.16%

SOURCES: NAB EXHIBIT 39X; CABLE DATA CORP.



1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

9-24-91

In the Matter of }
1984 Cable Royalty }
Distribution Proceeding }

Not Submitted as
exhibit, but was
officially noted
by CRT.

On April 18, 1986, the declaratory rulings regarding the 1984 Nielsen Special Study. Suppliers asked: (a) Whether a program is uniquely for a single group, licensed to or broadcast by a station in the "Local" category; (b) whether to continue to include all television events and parades, as well as "announced," and foreign language stations; (c) should the Tribunal include coverage of political events, and parades are not to be included in "Other," what criteria are to be used to classify these programs, as they are rarely, if ever, listed in the BIB Book, ROSP, or SPA; and (d) whether individual programs on foreign-language specialty stations are to be classified separately. The Program Suppliers also listed their definitional instructions to Nielsen in the appendix to their motion.

The Tribunal received comments from the Joint Sports Claimants, NAB, Multimedia, and reply comments from the Program Suppliers. In addition to commenting, NAB proposed that the Tribunal institute a general rulemaking to define all program types used by the Tribunal in Phase I proceedings.

The Tribunal considers that it is sufficient at this time to issue an advisory opinion in areas where it believes have been of most concern to all parties. It is the Tribunal's opinion that:

- a) "Local programs" are programs licensed to/produced by and broadcast by a single broadcast station during the calendar year in question, and not broadcast by any other station.

(To the extent a syndicator of a program is considered in the "local" category because he/she was able to syndicate to only one station in the calendar year, he/she would be entitled to a settlement or a Phase II proceeding in the local category.)

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